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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

■

WILLIAM MURRAY ESTEP, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

■

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

together with

SUPPORTING BRIEF and APPENDIX

containing

Opinions of Court Below

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

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WILLIAM MURRAY ESTEP, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

■

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, William Murray Estep, presents this his petition for writ of certiorari and shows unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement.*

Although this case arises under Section 11 of the Selective Training and Service Act of 1940, as amended, (50 U. S. C. App. § 311) the questions presented by this petition have neither been decided nor foreclosed by this Court's decision in *Falbo* v. *United States*, 320 U. S. 549, for each and every reason stated in the opinions of the dissenting judges of the court below sitting *en banc*.

2. *Opinion of Court Below.*

The opinion of the United States Circuit Court of Appeals is not yet reported in the Federal Reporter. It

appears in the record certified to this Court ( )[1] The entire opinion and the dissenting opinions appear also as an appendix to this petition.

3. *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

4. *Timeliness of this Petition.*

The decision of the Circuit Court of Appeals was entered on July 6, 1945. The judgment of the court below became final on July 6, 1945.

5. *Statutes and Regulations Involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are drawn in question here, together with Sections 601.5, 615.43 (a), 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 626.2, 626.3, 627.12, 627.13, 629.1-629.35, 633.2, 633.21, 642.41, and 642.42 of the Selective Service Regulations[2] (32 C. F. R. Supp. 601.5 *et seq.*) promulgated by the President under said Act.

6. *Constitutional Provisions Involved.*

Clause 3 of Section 9 of Article I prohibiting enactment of Bills of Attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

7. *Questions Presented.*

(1) Does reporting at the induction station pursuant to the order and refusing to submit to induction by stepping forward after acceptance by the armed forces constitute exhaustion of the administrative process so as to qualify petitioner for a defense to the indictment?

(2) Where the undisputed evidence shows that peti-

[1] Figures appearing in parentheses in this petition and the supporting brief refer to pages of the printed transcript of the record.

[2] The Regulations are amended frequently. The sections here set out are as they existed when the facts in controversy took place.

tioner's rights to procedural due process on appeal have been denied him by the local board so as to prevent the appeal board from properly exercising its rights under the Act and regulations, may he show in defense to the indictment that the administrative agency acted illegally and unconstitutionally and that the order on which the indictment was based is void?

(3) May the petitioner who is a minister of religion, exempt from all training and service by provision of the Act, show in defense to the indictment that his constitutional rights have been violated by the board's action in excess of its jurisdiction or authority and contrary to the Act and Regulations?

(4) Did the trial court err in refusing to allow petitioner the right to show, and in refusing the jury the right to consider that the order on which the indictment was based is void because petitioner is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) contrary to the undisputed evidence, (e) without support of substantial evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

(5) Did the trial court err in holding that it and the jury could not consider the illegal and unconstitutional action of the draft boards and in limiting the issue to be decided to whether or not petitioner knowingly failed to submit to induction, as specified in the order to report?

(6) Does the construction placed upon the Act and Regulations by the court below, requiring petitioner to report and submit to induction, and apply for a writ of habeas corpus as a condition precedent to judicial review of the illegality and unconstitutionality of the action by the board, violate Clause 3, Section 9 of Article I, and Article

III, of the United States Constitution and the Fifth and Sixth Amendments thereto?

(7) Did the trial court err in denying petitioner's motion to quash the indictment, motion for an instructed verdict and for a judgment of acquittal, in excluding proffered evidence, and in denying requests for charges, all of which pertained to the illegality of the administrative order?

(8) Did the courts below err in holding that the only method of attack against an illegal and unconstitutional action of the draft boards was by application for writ of habeas corpus?

Statement of Case

FORM OF ACTION

This criminal action was instituted in the court below by return of an indictment charging petitioner with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. (1)

The indictment charged that petitioner, a registrant classified for training and service in the armed forces, "did unlawfully, wilfully and knowingly fail and refuse to submit to induction; he, the said defendant, having no valid reason for having failed and refused to perform the duty as aforesaid, in violation of the directions given the said defendant under rules and regulations made pursuant to the Selective Training and Service Act of 1940, as amended." (1)

Thereafter petitioner pleaded "not guilty". (277) Petitioner filed a motion to quash the indictment on the grounds that the construction placed upon the criminal sanctions clause so as to deny him his right to show, in defense to the indictment, that the orders of the draft boards were void and illegal, violated the Constitution of the United States. (2-4, 277) The motion to quash was overruled, after argument to the court, on December 6, 1944. (4, 277) The trial to a jury before the court began on De-

cember 7, 1944. (5, 277) The court excluded and received evidence upon the trial. The case closed when all the evidence was in on December 7, 1944. (113, 278) At the close of the evidence, the petitioner moved for dismissal of the indictment and for a judgment of acquittal (113-116), and for a directed verdict of not guilty. (116-120) In these motions the reasons were stated extensively. (113-120) The motions were denied and exceptions allowed to petitioner. (120-121) Petitioner duly submitted to court, before argument of counsel to the jury, his requested instructions to the jury. (121, 123-145)

On December 8, 1944, the cause was argued to the jury by counsel. (146, 278) Thereupon the court charged the jury. (146-148) The court refused all of petitioner's requested charges to the jury and allowed exceptions to his ruling. (148-149) Petitioner duly objected and excepted to the court's charge. (149-154). The jury retired to consider the verdict at 11:06 am. (154) At 4 pm the jury sent a message to the court that the jurors were hopelessly deadlocked and could not reach a verdict. (154) Thereupon the petitioner waived his constitutional right to a unanimous verdict and agreed to have the issue of his guilt decided by a majority verdict. Counsel for the parties so stipulated which was approved by the court. (154-155) The jury thereupon rendered its verdict of guilty on December 8, 1944. (155-156) Eleven jurors were for conviction, one for acquittal. (156) On December 20, 1944 the United States District Judge rendered judgment upon the verdict of the jury and sentenced petitioner, committing him to the custody of the Attorney General for a period of five years. (160, 249, 278)

Petitioner duly served and filed his written notice of appeal in the time and manner required by law. (250-253, 278) He timely filed his assignments of error which support each ground of this petition. (253-276) In due course the case was argued and submitted to the United States Circuit Court of Appeals for the Third Circuit. It was reargued before six judges of the court sitting *en banc* May 31, 1945.

The judgment of conviction was affirmed by that court on July 6, 1945. ( )

FACTS [3]

The petitioner, now 22 years of age, registered under the Selective Training and Service Act of 1940, on June 30, 1942, with Local Board No. 4 of Washington County, Pennsylvania. (6, 97, 243) He was thereupon assigned order number 11918 by said board. (243) Petitioner timely filed a Selective Service Questionnaire on August 22, 1942, answering the questions required of him. (6, 161-165) In Series VIII he stated he was a minister of religion, did customarily serve as a minister and had been a minister of the Watchtower Bible and Tract Society and Jehovah's witnesses since 1936. (163) He stated that he was ordained as a full-time pioneer minister on October 1, 1941. (163) In said questionnaire he claimed classification of IV-D exempting him as a minister of religion under Section 5 (d) of the Act. (164)

Also filed by Estep was a Special Form for Conscientious Objector properly filled out, which contained additional evidence as to his training for the ministry and his activity as a minister. (194-199) Estep showed that he had attended the Third Ward School at Canonsburg, Pennsylvania, from 1928 to 1935, when he was expelled from said school because of his failure to salute the American flag, contrary to his conscientious convictions. (75, 196) Thereupon he enrolled in the Gates Kingdom School operated by Jehovah's witnesses and located at Gates, Pennsylvania. (196-197) In this school he pursued the regular subjects, generally taught in the public schools, until 1940 when he graduated after successfully completing all courses, including the 12th grade. (77-78) Moreover, he additionally attended the special course of study prescribed by such school

[3] See dissenting opinion, pages 11a to 15a, *infra*, for a more abbreviated statement of the facts.

for the training of young men who desired to prepare for the ministry. He pursued this course from 1935 to 1940. (78) He filed with the local board his own written statement giving details as to his ministerial work, also a sworn certificate of ordination issued by the Watchtower Bible and Tract Society, certifying that he was a full-time pioneer minister and had been acting as such since October 1, 1941. (190-191, 192, 213)

There was no evidence in his file disputing the evidence and claim that he was a duly recognized minister of religion, representing a religious organization known as Jehovah's witnesses and, as its legal governing body, the Watchtower Bible and Tract Society. There was no evidence that the petitioner did not devote substantially all of his time to the performance of his missionary evangelistic work. There was no evidence that he did not fit, as a minister of religion, Opinion No. 14 of National Headquarters of Selective Service concerning ministerial status of Jehovah's witnesses; that he did not stand in relation to Jehovah's witnesses in the same way that the recognized orthodox clergy stand toward their congregations; that he did not perform ceremonies that are ordinarily performed by ministers of religion under the Act. The Report of Physical Examination and Induction (D.S.S. Form 221), Defendant's Exhibit S, under Occupation and Industry, shows that he is a "minister—Perform Missionary and Evangelical services in organizing churches". (160-245)

The local board denied his claim for exemption on October 3, 1942, and placed him in Class I-A, making him liable for training and service in the armed forces. (6, 164) Petitioner filed additional evidence and duly and timely requested a personal appearance, which was granted for October 21, 1942. (98, 99, 193) After such personal appearance the local board continued him in Class I-A. (99, 212) On October 23, 1942, Estep appealed to the board of appeal, asking for classification as a minister exempt from all training and service. (7, 9, 99, 213)

Estep's appeal was taken October 27, 1942. (9) The file was not forwarded from the local board until July 28, 1944. (9) He went to the local board on or about October 27, 1942, and offered to file his written statement of appeal and three affidavits supporting same. (24-25, 99-100, 169-172, 175-181) The local board clerk *falsely* informed him that his file had been forwarded to the board of appeal, when at the time he made the statement he knew that petitioner's file was in the possession of the local board and had not been sent to the board of appeal. (5-17)

The clerk admitted that he lied to defendant for the purpose of depriving him of his right to have his case reopened and to submit the additional evidence to be filed in his Cover Sheet and withholding the same from the Board of Appeal. (15-16)

Sometime after December, 1942, through some irregularity or mistake Estep's Cover Sheet was misplaced or lost by the local board. It was not found until February 1944. (9, 14) Petitioner during this time, relying on the statement of the local board clerk, believed that his file was with the board of appeal. After his file was lost the regulations were amended so as to prevent the file from being forwarded to the board of appeal until the registrant had taken a pre-induction physical examination to determine his physical condition. If his physical examination revealed that he was not fit for service his classification would be changed. (Reg. 627.14) On April 19, 1944, he was ordered to report for preinduction physical examination on April 28, 1944. (101, 220) He complied with such order and was accepted for military training and service and assigned to the Naval Forces. (101, 221) He then learned for the first time since November 1942 that his file was not with and had never been sent to the board of appeal. He then examined his file and found part of the evidence missing. He then obtained eight additional affidavits showing that he had continued his full-time ministry and stood in relation to Jehovah's witnesses the same as do the orthodox clergy of the

recognized religious denominations to their congregations. (101-103) He also obtained copies of the missing documents, placed them with the affidavits the board had refused to accept and place in his Cover Sheet in 1942, and some additional affidavits he obtained in 1944 and, on May 23, 1944 by registered mail, he sent all this proof to the local board, together with a covering letter requesting that they be placed in his Cover Sheet for reconsideration by the local board and forwarded along with his file to the board of appeal. (101-103) At that time his file was still with the local board, and was not forwarded to the board of appeal until July 28, 1944. (9, 222) However, the local board declined to reopen his case and did not place the additional evidence received from the petitioner by registered mail on or about May 23, 1944, in his Cover Sheet, and did not forward the same to the board of appeal. (11, 15-16) Although these documents were in the possession of the local board, they were never seen by the board of appeal, the State Headquarters or the National Headquarters of Selective Service System. (11-12)

The local board prepared and filed its written arguments against the case of petitioner with the board of appeal contrary to the Regulations. (29, 29-30, 58-59, 223) This letter from the local board was considered by the board of appeal, and the classification of 1-A was given largely because of the misleading and prejudicial statements made by the local board to the board of appeal. (63) On August 28, 1944, the board of appeal, not considering the evidence rejected by the Local Board, classified petetioner in Class 1-A making him liable for training and service in the armed forces. (7, 103, 165)

It was offered to be proved by the chairman of the local board that the local board withheld from the consideration of the board of appeal this additional evidence. (57-58) It was offered to be shown by the chairman of the board of appeal that if the local board had included this evidence in the file it would have been considered by the board of appeal

with a different result in the classification of petitioner. (63) Both offers were rejected by the trial court.

The Pennsylvania State Headquarters of Selective Service requested additional information as to Estep's ministerial activity, even after the board of appeal had affirmed the action of the local board. The local board, in compliance with this request, took a short statement from petitioner and refused to send up the voluminous amount of evidence which it had previously refused and withheld from the board of appeal. (226-227) (See comment of the State Headquarters as to the illegality of the action of the local board in this connection. (228) Moreover, it should be observed that the local board placed additional information in Estep's file after his 1942 appeal had been taken, which information was the prejudicial, anonymous letter with newspaper clipping attached. (218-219) Those two papers were placed in the file after the board had turned down Estep's request made in October 1942 to add *his* additional evidence.

Estep communicated with the Pennsylvania and National Headquarters of Selective Service requesting review of his file and an appeal to the President of the United States in his behalf. (103, 229-231) This was declined. (232-233) Petitioner received a notice to report for induction on September 11, 1944. (8, 165-166) He reported for induction on such date as directed. (8, 31, 103) He was sent by the local board to the induction station at the Old Post Office Building in Pittsburgh. (103-104) He arrived there on September 11, 1944 at 9 am. He was questioned as to his occupation and background. (104) He informed the woman clerk, who recorded his replies, that he was a full-time ordained minister of the gospel and missionary evangelist, preaching from house to house as did Christ Jesus and the apostles, that he would obey all the laws of the land consistent with God's law. (104-105) He was then questioned by doctors who gave him a physical examination, upon completion of which he was again declared physically and

mentally fit for training and service and his acceptance of April 1944 confirmed. (105-106) One of the doctors attempted to persuade him to submit to induction and obtain a commission as a chaplain in the Navy. (105-106) He informed the doctor that Jehovah's witnesses were ambassadors of God's Theocratic Government, requiring them to be strictly neutral. He said he was a soldier in the army of Christ, wearing the uniform of Christ Jesus and using the weapons Christ Jesus had prescribed, namely, the 'sword of the spirit, which is the word of God' (105-106), and that it was impossible for him to serve in two armies at the same time. (105) He was then requested by an officer to state what branch of the Navy he cared to go into. He declined to make a choice, explaining again that he was an ordained minister, exempt from all training and service and not required to choose. (105) He informed the officer that his entire time and energy was devoted to the proclamation of the Theocratic Kingdom in order that all people of goodwill might learn of God's provision for them to gain everlasting life on earth. (106) He was then directed to leave the induction station and return the next day. (106-107) He left at 2:30 pm, September 11, and the next morning returned to the place at the time instructed. (106-107) He refused to sign an oath that obligated him to submit to the command of the Commander-in-Chief of the armed forces of the United States, explaining that he was an ordained minister not subject to training and service in the armed forces and that the draft boards had violated the law, rather than he, that the draft board had required him to do an act which would cause him to break his covenant with Almighty God, resulting in his everlasting destruction. Estep said he told the officer that since no representative of the United States government could grant him a pardon from the punishment of everlasting death prescribed by Almighty God for him if he should break his covenant, likewise no representative of the government had authority to force him to perform an act which would result in break-

ing his covenant and everlasting death. (107-108) The officer told him that the easiest way out of the difficulty would be to go ahead and be inducted. Petitioner replied that he was not looking for the easiest way out because he was a footstep follower of Christ Jesus who admonished that all His true followers would be hated of all nations, persecuted, mistreated, imprisoned and many even killed for maintaining their integrity and thus be required to face the toughest way. (107-108) Thereupon the officer referred petitioner to Lt. Commander Elmer B. Keckler of the United States Navy, commanding officer of the Navy Recruiting and Induction station at Pittsburgh. (32-33, 107-108) He was taken before Commander Keckler who, in the presence of Chief Electrician Mate E. L. Tissue, asked petitioner what it was all about. Keckler asked Estep to sign a statement and Estep told him that he had submitted to Keckler a letter of explanation which was complete and a written record of his purpose in appearing. Keckler received the letter. (32-38, 108-109) After Estep explained why he could not submit to induction, Keckler again requested him to sign a statement and Estep again refused. (32-35, 109) Keckler sent Tissue out of the office to look for several witnesses to the refusal of petitioner to submit to induction and to refuse to sign the statement. While Tissue was gone, petitioner explained fully to Keckler the work of Jehovah's witnesses and that he was doing a work of great national importance, that he was telling the people of the Kingdom of Christ Jesus, a Theocratic Government that would be ruled by Jehovah God through his Son Christ Jesus, who would have visible representatives on the earth as princes, namely, the faithful men of old recorded in Hebrews chapter 11, who would be resurrected and brought back to earth, that all the present governments of the earth under the bondage of the greatest dictator of all times, Satan the devil, would be destroyed at the battle of Armageddon at the hands of Christ Jesus. Estep informed him that before this battle began it was necessary that the

people be warned and that he was engaged in that warning work by carrying the Gospel message of the Kingdom as a missionary evangelist to the people at their homes. (110-112) Tissue returned with the witnesses who signed the statement that petitioner refused to submit to induction after being requested to go through the induction ceremony by stepping forward and taking the oath. (110-112) The officer's statement appears in the record. (242) This the petitioner admitted he refused to do. (111)

In his letter to the commanding officer, copy of which he had filed with the local board, he stated that he was reporting because the law required him to do so; that he was an ordained minister of the Gospel, exempted from all duty but willing to obey all the laws of the United States that are in harmony with the law of God and which would not require him to give up his ministry; that the undisputed evidence showed that he was a minister of religion within the meaning of Section 5 (d) of the Act, exempt from military training and service; that the local and appeal boards violated the law in denying him the exemption; therefore the armed forces did not have authority to require him to submit to induction. (38-39, 239-240)

After his refusal to submit to induction was properly witnessed, petitioner was directed to leave the induction station. (111-112) He returned to his home and was thereafter arrested, charged and indicted for alleged violation of the Selective Training and Service Act, as aforesaid. (112)

The draft board file, including the questionnaire, showed that petitioner was a minister and conscientiously opposed to combatant and non-combatant military service, and was properly entitled to exemption and classification as an ordained minister in Class IV-D and that the boards had acted capriciously and arbitrarily in classifying him in Class I-A over his objection, and had no jurisdiction to order him to submit to induction by taking the oath. (161-165, 190, 192, 194-199, 200-230)

There is no written proof or evidence reduced to writing which shows that petitioner was not recognized, authorized or ordained by the Watchtower Bible and Tract Society and Jehovah's witnesses. (161-230) There was no evidence that he did not devote substantially all his time to the regular performance of ministerial duties in behalf of said organization. There was no evidence that he did not perform the religious ceremonies and duties. There was no evidence that the Watchtower Bible and Tract Society did not recognize petitioner as standing in relation to it as do the ministers of the orthodox religious organizations. (161-230) There was no evidence that petitioner did not follow this profession, devote his time and preach at all times shown in his papers before the board and in the manner described by him therein. There was no written evidence in the file disputing the facts stated by him in Series VIII of the questionnaire and in the other documents filed with the board in reference to his ministerial activity. There was no evidence in the file in writing which showed that petitioner falsified his claim as a minister or that he falsely impersonated a duly recognized minister of the recognized religious organization known as Jehovah's witnesses. (161-230)

How Issues Were Raised

By motion to quash the indictment petitioner claimed that the administrative process had been sufficiently completed so as to permit him to challenge the legality of the classification and orders based thereon. (2-4) He asserted that if the Act and Regulations were so construed as to deny him these defenses, they were unconstitutional because a Bill of Attainder, contrary to Clause 3, Section 9 of Article I of the United States Constitution; because they surrendered the judicial power to the draft boards contrary to Article III of the Constitution; because they denied the right to a judicial trial contrary to the due process

clause of the Fifth Amendment to the United States Constitution; because they deprived the petitioner of his right of trial by jury contrary to the Sixth Amendment to the United States Constitution. (2-4, 277) The trial court overruled the motion to quash with exception to petitioner. (4, 277)

Upon cross-examination of government witness McNutt, clerk of the local board, the petitioner attempted to prove that McNutt, acting for the local board, lied to petitioner by stating that his file was with the board of appeal, for the purpose of denying petitioner his right to present additional evidence for a reconsideration by the local board of petitioner's case and for consideration by the board of appeal, and that this was a conspiracy on the part of the local board and McNutt to deprive petitioner of his constitutional rights to have a full and fair hearing before the administrative agency. (11, 16-21) The court held that petitioner did not have the right to challenge the legality of the classification and orders because he did not comply with the order of the armed forces to submit to induction. (20) Petitioner excepted to this ruling and the remarks of the court. (21)

Upon cross-examination of government witness McNutt, petitioner attempted to show that the additional documentary evidence which he offered in May 1944 to the local board for its consideration and to be placed in his Cover Sheet for forwarding to the board of appeal was unlawfully and fraudulently withheld from the board of appeal by the clerk and members of the local board as part of a conspiracy to deprive petitioner of his procedural rights under the Act, the Regulations and the due process clause of the Fifth Amendment to the United States Constitution. (24-29) The court held that unlawful and unconstitutional acts of the draft boards were not subject to judicial review in defense to the indictment charging petitioner with refusal to submit to induction. The court declared that the only issue to be decided by the jury was whether or not peti-

tioner refused to submit to induction. (27, 29) Petitioner excepted to this holding on the ground that it abridged his constitutional rights and placed a construction upon the Act and Regulations that made them contrary to the United States Constitution, for each of the reasons specified in the motion to quash. (27, 29)

The trial court also excluded from evidence over the objection of petitioner the testimony of petitioner's witness, Thomas M. Reese, chairman of the local board. If permitted to testify Reese would have said that all the evidence reduced to writing in petitioner's file showed that petitioner was a duly recognized missionary evangelistic minister of the Watchtower Bible and Tract Society and Jehovah's witnesses, a recognized religious organization under the Act; that petitioner devoted substantially his entire time to the performance of such preaching and had no occupation other than minister of the Gospel; that there was no evidence in the file disputing petitioner's claim as a missionary evangelist, representing the Watchtower Bible and Tract Society; that petitioner did not fictitiously claim exemption as a minister; that the local board could not point out from the file where petitioner did not fit Opinion No. 14 of the National Headquarters concerning classification of Jehovah's witnesses as ministers of religion under the Act and Regulations; that the local board wrote a letter expressing its opinion to the board of appeal, contrary to the Regulations, in violation of the procedural rights of petitioner, that in such letter the board of appeal was advised that petitioner should not be classified in IV-D because his name did not appear on the certified official list of ministers of Jehovah's witnesses filed with State Headquarters and that the statement in the letter that petitioner devoted only three days weekly to the performance of his missionary duties was not supported by written evidence in the file; that the local board unlawfully withheld from the petitioner's file documentary evidence appearing in defendant's Exhibit A and had declined to re-

open and consider anew petitioner's classification and had unlawfully withheld the documentary evidence from consideration by the board of appeal in violation of the Selective Service Regulations and the due process clause of the Fifth Amendment to the United States Constitution. (55-59, 167-189)

The trial court erroneously excluded from evidence, over the objection of petitioner, testimony of petitioner's witness, Frank A. Pireaux, chairman of the board of appeal. (61) If permitted to testify Pireaux would have said that the board of appeal considered only the evidence reduced to writing in the petitioner's file, which showed that the Watchtower Bible and Tract Society was a recognized religious organization under the Act; that petitioner was a regular minister of that Society from 1936 to 1944; that there was no evidence to dispute petitioner's claim that he was devoting substantially his full time to the performance of his work as a missionary evangelist; that the board of appeal did not find that petitioner fictitiously claimed to be a minister of the Watchtower Bible and Tract Society; that the only reason the board of appeal did not classify petitioner as a minister of religion was because his name did not appear on the official certified list on file at State Headquarters of Selective Service; that the board of appeal considered the letter written by the local board to the effect that petitioner should not be classified as a minister because his name did not appear on such certified list; that they were persuaded by the false statement of the local board that petitioner devoted only three days weekly to his ministry; that the board of appeal did not consider the affidavits and documentary proof offered by the petitioner, appearing in Exhibit A, because they were not forwarded to the board of appeal by the local board; and that if the board of appeal had considered the documentary evidence appearing in Exhibit A, they would have reached a different conclusion and found that petitioner was exempt

from all training and service as a minister of religion. (61-66, 167-189)

The trial court erroneously excluded from evidence Defendant's Exhibit "A" which contained several documents proving the ministerial status and full-time evangelistic missionary work done by petitioner. Some of these documents were offered to the local board in 1942. The local board at that time illegally refused to receive them and consider them or to reopen the case, falsely stating to petitioner that the file was in the hands of the board of appeal. Additional documentary proof was prepared in 1944 added to these documents and mailed to the local board before Estep's file was forwarded to the board of appeal so the board could reopen the case, file the evidence in the Cover Sheet, and forward the same to the board of appeal. The local board illegally and unlawfully refused to place the evidence in the file and fraudulently withheld the same from the board of appeal, contrary to the Regulations and in violation of procedural rights of the petitioner guaranteed by the due process clause of the Fifth Amendment to the United States Constitution. (10-11, 24, 50-52, 167-189) This evidence was objected to by the Government and the court sustained the objection with exception to petitioner. (24, 52)

The trial court erroneously excluded from evidence Defendant's Exhibit J, an anonymous note to the local board to which was attached a newspaper clipping concerning the sentence of Nick Falbo, the writer requesting the board to take similar action against Estep. This additional information was placed in the petitioner's Cover Sheet in December 1942, by the local board after the appeal was taken, and after refusing to receive additional evidence tendered by Estep. It was offered for the purpose of showing that petitioner had been denied his procedural rights by placing prejudicial information in his file which was not evidence as to his ministerial status. (15, 18, 218-219) The court sustained the objection of the Government with exception

to petitioner. (48)

The trial court erroneously excluded from evidence, with exception to petitioner, the testimony of petitioner's witness, Charles R. Hessler, a full-time district superintendent and minister of Jehovah's witnesses and the Watchtower Bible and Tract Society connected with the organization since 1917. Hessler would have testified that he had under his supervision as presiding minister in the district of Pittsburgh, the congregations located in Allegheny and Washington counties; that he became acquainted with petitioner, William Murray Estep, in 1936; that Estep enrolled as a student in the advanced course of ministry in the divinity school conducted by Jehovah's witnesses at Pittsburgh and later in Washington county, attending three nights weekly; that he was president of a religious corporation organized to operate a school to provide education for young "witnesses" excluded from public school for failing to salute the American flag, which school also provided a regular course of study for the purpose of training and preparing young men for the ministry; that Estep regularly attended this school, pursuing the regular course and the special ministry training course from 1936 to 1940 when he graduated after successfully completing the prescribed courses of study; that he personally authorized petitioner to preach as a part-time minister in 1936 while continuing his course of study in preparation for his full-time ministry; that since 1940 he had seen Estep grow from a part-time to a full-time minister; that Estep stands in the same relation to Jehovah's witnesses as do the orthodox clergy toward its denominations; that he knows that Estep is authorized to perform burial, baptismal and other ceremonies; that Estep has regularly served in the capacity of a full-time pioneer and evangelistic minister since October 1941. (67-71) This evidence was offered for the purpose of a *de novo* consideration of the court upon the issue of exemption of the petitioner from training and service under the Act, and to establish that the administrative agency

had no authority to order the petitioner to submit to induction into the armed forces and that petitioner had been deprived of his constitutional rights contrary to the Fifth Amendment to the United States Constitution. (71-72) This evidence was excluded with exception to petitioner. (72-73)

Similar offers of proof were made in connection with the testimony of petitioner's witnesses Stewart, McKnight, Singer and Ferree. (73) These offers of proof were made for the same purpose as the offer of proof in connection with the testimony of Charles R. Hessler. (73) These offers of proof were excluded for the same reasons. (74) Exceptions were allowed to the petitioner for the exclusions. (74)

The trial court erroneously excluded from evidence the testimony of the petitioner, William Murray Estep, as to his plans to become a minister at a very early age; the instruction he received at home from his parents in preparation for the ministry; his enrolling in the Watchtower Divinity School at an early age; his regular attendance at such school with his parents; that after becoming qualified to teach and preach in 1936 he began to preach part time from house to house; that while pursuing his part-time ministry he regularly attended the Gates Kingdom School which provided instruction in the regular public school subjects from the first to the twelfth grade and also a special course for the preparation of young men for the ministry; that he attended this Kingdom School from 1936 to May 1940; that shortly following his graduation he became assistant to the presiding minister of the Washington, Pennsylvania, congregation of Jehovah's witnesses and thereafter devoted a large part of his time to preaching as a missionary evangelist; that in October 1941 he undertook his full-time pioneer evangelistic missionary work and also continued to act as assistant to the presiding minister of the Washington congregation of Jehovah's witnesses, devoting an average of more than 150 hours monthly to actual

preaching in addition to time required for daily study and preparation for carrying on his ministerial duties; that thereafter in the performance of his full-time ministerial duties, he was transferred by the legal governing body of Jehovah's witnesses, the Watchtower Bible and Tract Society, to serve in ministerial capacities in New York City, Uniontown, Pennsylvania and Akron, Ohio; that his duties consisted of calling from house to house as did Christ Jesus and his apostles, publicly preaching upon the streets by distribution of *Watchtower* and *Consolation* magazines, by calling back on interested persons and answering Bible questions, by establishing and conducting studies in the Bible and Bible helps in the homes of the people and by regularly delivering Bible sermons to congregations of Jehovah's witneses at least once weekly. (78-97) This evidence was offered for the purpose of a *de novo* consideration of the court upon the issue of exemption of petitioner from training and service under the Act, and to establish that the administrative agency had no authority to order petitioner to submit to induction into the armed forces and that petitioner had been deprived of his constitutional rights contrary to the Fifth Amendment to the United States Constitution. (74, 97) This offer of proof was objected to by the Government. (78, 97) The court sustained the objection, excluded the evidence, with exception to petitioner. (97)

The trial court erroneously excluded from evidence Defendant's Exhibit C, petitioner's certificate of ordination with accompanying documentary evidence (12, 45, 192); Defendant's Exhibit D, a written request of petitioner for a personal appearance before the local board, together with documentary evidence (13, 46, 193); Defendant's Exhibit F, a transcript of the proceedings at the personal appearance on October 21, 1942 (13, 47, 200-211); and Defendant's Exhibit N, a letter from petitioner to the local board dated August 21, 1942 (21, 49, 224), all of which documentary evidence was duly filed with the local board and

made a part of the Cover Sheet and duly considered by the local board and board of appeal upon a determination of Estep's claim for exemption from training and service under the Act and Regulations. This evidence rejected by the court (45, 46, 47, 49) showed that petitioner was at all times a minister of religion; that there was no credible evidence or substantial evidence before the administrative agency which disputed Estep's evidence that he was a duly recognized minister of the Watchtower Bible and Tract Society and Jehovah's witnesses; that the action of the administrative agency was contrary to law, without support of substantial evidence, arbitrary and capricious, contrary to the Act and Regulations, in excess of authority and in violation of the due process clause of the Fifth Amendment to the United States Constitution. (192, 193, 200, 224)

At the close of the evidence petitioner moved for a dismissal of the indictment (113-115) and for a directed verdict (116-120) on the grounds that the undisputed evidence showed that the draft board order was void because the board acted in excess of its authority in that petitioner was a minister of religion exempt from all training and service and was not liable for training and service under the Act; that he had exhausted his administrative remedies and was in a position to challenge the action of the administrative agency and the orders on which the indictment was based; that the board had denied him his rights of procedural due process by rejecting the evidence and that the court had construed the Act and Regulations so as to require a registrant to submit to induction as a condition precedent to a judicial review, which denies the petitioner the right of a judicial trial contrary to the Constitution of the United States. (113-120) Each motion was denied with exception to petitioner. (120-121)

Petitioner duly tendered to the court requested charges to the jury. (123-145) The requested charges defined what constituted a regular or duly ordained minister of religion (123, 123-124, 124-135), stated the duties of draft boards in

considering the ministerial status of Jehovah's witnesses under the Act and Regulations as declared by the Director of Selective Service in Opinion No. 14. (135-136, 139-141) The court was requested to charge the jury that if they concluded and found that the undisputed evidence before the draft boards showed that petitioner was a minister of religion and of Jehovah's witnesses (136-138) and there was no substantial evidence that he was not such a minister as claimed (138), that they could aquit the petitioner by their verdict saying he was not guilty. (136-138) The court was requested to charge the jury that if they found that the boards acted in excess of authority, without jurisdiction, contrary to law, without support of substantial evidence, contrary to the undisputed evidence, contrary to the Constitution, the Act and Regulations and arbitrarily or capriciously, they could render a verdict of not guilty. (135-140) These requests were each refused separately and exception allowed to each refusal. (148-149)

The court instructed the jury that the classifications made by the draft boards were final and binding upon the court and jury and could not be questioned, that the only issue to be determined was whether or not the petitioner submitted to induction, that if the evidence showed that petitioner failed to submit to induction, it would be the duty of the jury to find the petitioner guilty. (147) The court charged the jury that they could not say whether or not the petitioner was a minister of religion, that the jury must find him to be a registrant liable for training and service, that at this trial was no place or time to review the correctness of the action of the draft boards. (147, 148) The court told the jury that the court and jury had no power to review the action of the draft boards but that such action must be accepted as conclusive. (147, 148) Petitioner objected and excepted to these portions of the court's charge on the grounds that he was thereby denied the right to urge in defense to the indictment that he was exempt from training and service as a minister of religion; that the

court instructed the jury to convict him; that the instruction of the court denied him his right to a judicial trial and a trial by jury, and abridged his rights and liberty contrary to the due process clause of the Fifth Amendment to the United States Constitution. (149-154) Moreover, the court's charge was objected to on the grounds that the holding that petitioner must submit to induction as a condition precedent to challenging the legality of the action of the administrative agency converted the Act and Regulation into a Bill of Attainder contrary to the United States Constitution. (152)

Throughout the trial, from beginning to end, the court held that the actions of the draft boards were binding upon petitioner, the court and the jury, and that petitioner could not challenge the same on any ground, or that his failure to submit to induction was not a wilful violation of the Act.

Specification of Errors

Petitioner relies upon every one of his assignments of error as grounds for a reversal of the conviction.

Reasons Relied on for Granting the Writ

Where the undisputed evidence shows that a Selective Service registrant has been deprived of his procedural rights upon appeal and there is not a scintilla of evidence showing that he has been afforded due process of law, then the administrative action is concededly contrary to the Act and Regulations so as to make void and illegal an order directing petitioner to submit to induction, because such action of the draft boards violates the due process clause of the Fifth Amendment to the United States Constitution. The issuance to the petitioner of the order upon which the indictment was based violated the due process clause. This case shows that petitioner did not have a fair and full hearing before the administrative agency and was denied

his rights on appeal to the board of appeal. Thereby more is proved in this case than that the decision of the administrative agency was wrong. The holding of the court below, therefore, departs from the principle of an applicable decision of this Court relative to judicial review of administrative action. *Bridges* v. *Wixon*, No. 788, October Term 1944, decided June 18, 1945, 13 L. W. 4554, 4558. Moreover, in holding that such illegal violation of the due process clause cannot be considered by the courts in determining whether or not the administrative action is illegal, the court below has rendered a decision in conflict with the decision of the United States Circuit Court of Appeals for the First Circuit on the same matter. *Tung* v. *United States*, 142 F. 2d 919.

The *Tung* decision is attempted to be distinguished by the majority opinion of the court below on the ground that Tung had not abandoned his administrative remedies but was attempting to pursue them. This effort on the part of the court below proves all the more that *its* decision in the instant case is in direct conflict with the *Tung* decision of the First Circuit! *The undisputed evidence shows that Estep had not abandoned the administrative remedies.* Indeed, he was attempting to invoke them as did Tung! The local board defiantly refused to follow the Regulations and deprived him of his right of appeal in the same way as did the board in the *Tung* case. Cf. *United States* v. *Peterson* (USDC N. Dist. Calif. 53 F. Supp. 760), *United States* v. *Lair* (USDC N. Dist. Calif. 52 F. Supp. 393).

Although there is no direct holding by this Court that one who exhausts administrative remedies by reporting for induction and is ordered to submit to induction may challenge the order, the holding of the court below conflicts with the dicta of this Court in *Falbo* v. *United States* (320 U. S. 549, 553) and *Billings* v. *Truesdell* (321 U. S. 542, 558-559) and is such a drastic departure from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision to halt the same and correct

the injustice committed against petitioner. See dissenting opinions ( ) Appendix, pages 21a-30a, *infra*.

Moreover, assuming that there is no conflict between the holding of the court below and other decisions of the Federal Courts, the question as to when, where and "how a registrant could raise as a defense to an induction order of his local board a failure to accord him the rights guaranteed to him under the Act, such failure in itself constituting a denial of due process of law" (*United States* v. *Pitt*, CCA-3, 144 F. 2d 169) is a very important question of federal law which should be settled by this Court. Inasmuch as it has not been settled, the writ of certiorari should be granted as requested in this petition.

There are other reasons why the petition in this case should be granted. There is confusion in the law as to when, where and how one charged with a violation of the Act may challenge the legality of an administrative order made contrary to the due process clause. The doubt is due to the failure of the Court to go beyond the narrow question presented in the *Falbo* case and clearly define the rights of parties complaining of administrative action under the Act. If a registrant can make no defense of the illegality of an administrative order upon which an indictment is based and if habeas corpus is the only remedy to test the validity of an order, which contentions the Government makes, then this Court should say so. No longer should the question remain in darkness as it was left in the *Falbo* case. Moreover, the language of the *Billings* opinion (321 U. S. 542, at pages 557-558) indicates that a registrant who has exhausted his administrative remedies, but who refuses to comply with the order by submitting to induction, may challenge the invalidity of the draft board order. In the *Billings* case this Court said that if a registrant who reports to exhaust his remedies is forced to comply with the order it would make a "trap" of the *Falbo* decision.

What was the "trap" which the Court spoke of in the *Billings* opinion? Inexorably, it appears to be submission to

induction as a condition precedent to judicial review after completion of the selective process which is the "trap" there mentioned. Indeed, if it is not, then he who appears to exhaust his remedies is as bad off as, if not worse off than, he who stays away entirely. (Cf. *Ex parte Young*, 209 U. S. 123, 147; *Wadley Sou. Ry.* v. *Georgia*, 235 U. S. 651, 660-663; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331.)

If this dictum in the *Billings* opinion was loose language, or if the Court inadvertently said what it did not intend to say, then the language ought to be promptly repudiated or otherwise clarified so that it will not continue to be dangled before the desperate registrant fighting for his liberty in defense to an indictment based on an illegal draft board order. If it is the law of the land that, in criminal prosecutions under the Act, the courts must follow the draft boards who refuse to follow the law, defy the Act and violate the constitutional rights of registrants, it is high time that the lower courts and the registrants be unmistakably notified so that they will know where they stand under the Act and Regulations. If the time has come in the field of administrative law that there is government only by men and not by law, the people are entitled to hear this Court say that such time has arrived.

Moreover, the instant case presents to this Court a question similar to that involved in *Giese* v. *United States*, — U. S. App. D. C. —, 143 F. 2d 633, and which was not settled by the *per curiam* opinion of the equally divided court in the same case reported at 323 U. S. 682. Since the petition for writ of certiorari was granted in the *Giese* case, it should be granted in this case. Inasmuch as questions were sufficiently substantial to require argument and cause a divided court in the *Giese* case, the questions here presented should be likewise and for the same reasons considered substantial enough to warrant the granting of the writ of certiorari. The decision of this Court in the *Giese* case (323 U. S. 682) is not a precedent because it was an opinion by a divided court.

Conclusion

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Third Circuit directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the judgment of said Circuit Court of Appeals, affirming the judgment of conviction entered by the District Court be here set aside and petitioner dismissed from custody or, in the alternative, the judgment be reversed and the cause remanded for a new trial not inconsistent with this Court's opinion; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

WILLIAM MURRAY ESTEP, *Petitioner*

By HAYDEN C. COVINGTON

Counsel for Petitioner

SUPPORTING BRIEF

Preliminary

For a statement as to the opinion of the court below, the basis on which the jurisdiction of this Court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the assignments of error relied upon, reference is here made to the foregoing petition for writ of certiorari.

The points of law pertaining to the right of the petitioner to show in defense to the indictment that the administrative order is void because the selective process has ended, thus completing the administrative remedies, have been fully discussed in *Rinko* v. *United States*, No. 1071, October Term 1944. See Petition for Writ of Certiorari, pages 25-34, incorporated herein by reference as though copied at length herein.

ADDITIONAL ARGUMENT

A

RIGHT TO DEFEND

The court below said that *Falbo* v. *United States* (320 U. S. 549) adopted the view that the only right of review of an illegal draft board order was by habeas corpus after induction. It is significant that the court below does not quote any such language in the *Falbo* opinion which could fairly justify this inference. This Court did not so hold in the *Falbo* case. Indeed, it has not yet been held by this Court that the only right of review of illegal draft orders is by habeas corpus as indicated.[4]

Whether petitioner has sufficiently completed his administrative remedies so as to qualify for judicial review of

[4] The view here taken by petitioner that he is entitled to defend to the indictment is fully supported by the dissenting opinion of Judge Biggs, concurred in by Judge Leahy. Reference is here made to the cogent dissenting opinion of Judge Biggs ( ) See Appendix, pp. 21a-29a, *infra*.

the illegality of the administrative order is an open question before the Court. A criminal case where a registrant has completely exhausted his administrative remedies, as Estep did, has never been decided by this Court. However, on May 28, 1945, the Court granted certiorari (65 S. Ct. 1406) in the case of *Smith* v. *United States*, 148 F. 2d 288 (CCA-4). The *Smith* case calls upon the Court to decide whether one who refuses to submit to induction may defend against the indictment on the ground that he has been erroneously classified by his local board. It does not present a situation where there has been a violation of the procedural rights of a registrant under the Act and Regulations contrary to the due process clause, as is here presented. Here the action of the agency is contrary to law.

Although the *Smith* case, in which certiorari has been granted, involved an indictment which charged Smith with failure to *report* for induction, it cannot be distinguished from the facts in this case. In that case the registrant appeared at the induction station, was examined by the armed forces and accepted for military service. It was then claimed that he was in the army, despite the fact that he had refused to submit to the induction ceremony. He was thereafter released on a writ of habeas corpus on the authority of the *Billings* decision. The district court and circuit court of appeals held in the *Smith* case that he failed to report for induction because he did not appear at the induction station with the intent of being inducted but merely appeared and defied the armed forces and refused to be inducted. It was held that such appearance constituted a failure to report for induction. Nevertheless the undisputed facts showed that he completed the selective process and was entitled to challenge the legality of the administrative order regardless of the type of indictment under which he was put to trial. In that respect the case at bar presents the same question as does the *Smith* case. The fact that the same question is before the Court in the *Smith* case is suggested as ground for granting certiorari in this case.

It is said that the decision in *Rinko* v. *United States*, 147 F. 2d 1 (CCA-7) (certiorari denied 65 S. Ct. 1086, petition for rehearing denied 65 S. Ct. 1402), disposes of the question presented here. Denial of certiorari imports no opinion by the Court upon the merits of the case. *House* v. *Mayo*, decided February 5, 1945, 65 S. Ct. 518, 521; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258. Denial of the petition for writ of certiorari in the *Rinko* case, viewed with the granting of the writ in the *Smith* case, can be accounted for only upon the assumption that this Court accepted the Government's argument in the *Rinko* case that Rinko had not completed the selective process by his stepping out of the line at the induction center before he reached the oath-administration ceremony. See Brief for the United States in Opposition, No. 1071, *Rinko* v. United States, October Term 1944, pages 8 and 10.

The Government's own argument as ground for denial of certiorari in the *Rinko* case is adopted as the distinction of the *Rinko* case from the *Smith* case and the *Estep* case.

The court below relied on *Goodrich* v. *United States*, 146 F. 2d 355 (CCA-5); *United States* v. *Flakowicz*, 146 F. 2d 874 (CCA-2); *Klopp* v. *United States*, 148 F. 2d 659 (CCA-6) and other cases. All these cases can be distinguished from both the *Smith* and *Estep* cases on the ground that none of the registrants there involved went to the end of the selective process. Each failed to appear at the induction station. None went as far as did Estep or Smith. If they had gone to the induction station and completed the selective process to the point of the induction ceremony, as did Smith and Estep, as suggested in *Falbo* v. *United States*, *supra*, they would have stood in the same position as do Smith and Estep. For these obvious reasons those cases are distinguishable.

Also the court below cited a large number of decisions by various circuit courts of appeals in cases where the respective defendants failed to report for induction and in which the facts were identical with the *Falbo* case on the

question of failure to complete the selective process. In the *Falbo* case, relied on by the court below, as well as in the other cases relied on, the registrant did not complete the "connected series of steps into the national service which begins with registration" and which "does not end until the registrant is accepted by the army, navy, or civilian public service camp." (*Falbo* v. *United States*, 320 U. S. 549, 553) In other words, these registrants did not go to the 'end of the administrative rope' as did Smith and Estep. Such cases cited by the court below fall within the *Falbo* rule and cannot be distinguished from the decision in that case. They are not authority for the decision of the court below.

The concurring opinion of Mr. Justice Douglas in *Hirabayashi* v. *United States*, 320 U. S. 81, 108, 109, relied on by the court below, throws no light on the holding in the *Falbo* and *Billings* cases which were decided long after the *Hirabayashi* case. Moreover, the recognition of the line of decisions holding habeas corpus after induction as the only remedy does not constitute an approval thereof. The argument that habeas corpus after induction is the only remedy is based on the decisions of cases arising under the 1917 Act which was essentially different from the 1940 Act. The very purpose of the Bone amendment to the 1940 Act was to keep registrants with claims for exemption and controversies with draft boards, and who desired to test the illegality of the action of the boards, entirely out of the armed forces. History under the 1917 Act shows habeas corpus frustrated training.

The decision in *Yakus* v. *United States*, 321 U. S. 414, 427-430, relied upon by the Government in the court below as supporting its contention that submission to induction is required to complete all "administrative remedies" by applying for a writ of habeas corpus, is distinguishable. There it was provided in the Act that one dissatisfied with an OPA ruling could appeal to the Emergency Court. Here the Act contains no such provision and since habeas corpus is a judicial remedy and is not provided for in the Act as

an "administrative" remedy it cannot be argued that the *Yakus* decision is in point. Naturally, if the Act provided for the registrant to appeal to the Emergency Court after appealing to the highest official in the Selective Service System, he must exhaust such remedies. There is no such remedy available here and the *Yakus* decision can be put aside as inapplicable.

The Government challenged petitioner's statement that habeas corpus is an illusory remedy. Although habeas corpus may be available to one wrongfully inducted, it is not the only remedy and may become entirely inadequate. For instance, after one is inducted he may be moved by the armed forces immediately to a point thousands of miles away from the place where his draft board and friends are located, for the purpose of being given military training, before he can apply for a writ of habeas corpus. Moreover, in some instances registrants are ordered to report for induction at a point hundreds of miles away from their place of residence. In either instance the inductee would be beyond the reach of compulsory process he may need to use for his witnesses, and often he would be found to be without friends or relatives near him to assist in obtaining an attorney for prosecuting a habeas corpus proceeding.

Indeed, habeas corpus after induction has proved to be a very uncertain source of relief. In instances where one refusing to submit to the induction ceremony, in order to avoid extreme military penalties, attempts to obey military orders pending the bringing and disposition of his petition for writ of habeas corpus, it has been held that the right to writ of habeas corpus is waived. *Mayborn* v. *Heflebower*, 145 F. 2d 864 (CCA-5) cert. denied, 65 S. Ct. 1087; *Catovolo* v. *Hibbs*, 145 F. 2d 866 (CCA-5) cert. denied, 65 S. Ct. 1087.

The decision of the court below perverts the present Act into the form of the 1917 Act by an illegal construction, which is reading into the present Act something that is not to be found therein, and which is contrary to the genius of the Bone amendment.

The original Senate [Burke-Wadsworth] Bill contained a provision for concurrent jurisdiction over violators of the Act in the civil and military courts. (86 Cong. Record, part 9, p. 10709) The Act was later amended to embody clear exemption from military jurisdiction by the violator who was not actually inducted. Senator Bone, introducing the amendment, said: "My amendment would substitute the United States District Court as the body to try such a young man [who violates an order to report for induction] instead of a naval or military court martial. . . ." (p. 10985) In conference of both houses, the Senate provision was accepted. The conference report reads: "The Senate Bill provided that persons subject to the Bill who fail to report for duty as ordered should be tried exclusively in the District Courts of the United States and not by military or naval court-martial, unless such persons had actually been inducted for the training and service prescribed in the Bill or unless they were subject to trial by court martial under laws in force prior to the enactment of the bill. . . .

"The conference agreement contains the provision of the Senate Bill in this respect."

It should be observed that Section 11 of the Act (50 U. S. C. App. § 311) provides that "No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted. . . ." If, therefore, the Act provides for a trial in a civil court and denies trial in a military court, due process requires that he have a judicial trial and not a trial by ordeal such as petitioner received in this case. See concurring opinion of Mr. Justice Black in *Keegan* v. *United States* (1945) 65 S. Ct. 1203.

Before the Committee on Military Affairs, House of Representatives, Major (now Major General) Lewis B. Hershey testified that the military authority should not be the policeman to enforce the Act. (Hearings before the Committee on Military Affairs, House of Representatives, 76th Cong. 3d Session, on H. R. 10132, pp. 125-126)

The First Report of the Director of Selective Service, 1940-41, declares that the prosecution of alleged violators, who have not reported for induction, has not been vested with the military authorities. He states that America learned the lesson from the Civil War when draft riots resulted; that there is considerable difference in the enforcement of the 1940 Act, as the legal obligations upon the registrant are not the same as under the 1917 Act. He also reported that all delinquents under the 1940 Act are prosecuted by civil authorities through the Department of Justice, that the military authorities had no jurisdiction over a delinquent.[5] He reports that the enforcement of the Act in this manner has gained acceptance by the general public.[6]

Moreover, the very purpose of the provision of the Bone amendment, for prosecutions in the United States District Courts under the criminal sanctions clause in Section 11 of the Act, was to keep controversies out of the jurisdiction of the armed forces because such frustrated the training of soldiers. Habeas corpus is particularly disruptive of the training program of the armed forces, and this was one of the reasons that motivated the Congress in providing for the criminal sanctions clause of the Selective Training and Service Act of 1940, rather than automatic induction as under the Selective Service Act of 1917.

Experience under the Draft Act of 1917 demonstrated that the prosecution of writs of habeas corpus was a dangerous impediment to the training of an army in time of national peril, thus proving the reason for the different framework in the 1940 Act. The situation was described as follows by the Provost Marshal General in his final report to the Secretary of War:

[5] *Selective Service in Peacetime* (Gov. Printing Office 1942), pp. 293-296. The Department of Justice is expected to enforce the criminal provisions of the Act, and not the Army or Navy. *Selective Service in Wartime*, p. 312

[6] *Op. cit.* p. 297. The increase in inductions has not proportionately increased the cases under the Act. *Selective Service in Wartime*, p. 311.

"During this draft the practice of serving writs of habeas corpus on the officers of the bureau became so prevalent as to interfere seriously with the progress of the business."

Silence of the Act does not prohibit the Court from allowing a defense to the indictment where it appears that the registrant has exhausted his administrative remedies upon a completion of the selective process. Reference is here made to the case of *Western Union Tel. Co.* v. *Lenroot* (1945), 65 S. Ct. 335, 344, where the Court said:

"Ascertainment of the intention of Congress in this situation is impossible. It is to indulge in a fiction to say that it had a specific intention on a point which never occurred to it. Had the omission of a direct prohibition of this employment been called to its attention, it might well have supplied it, for any reason we can see. Congress of course has the right to be indirect where it could be direct and to be obscure and confusing where it could be clear and simple. But had it determined to reach this employment, we do not think it would have done so by artifice in perference to plain terms. It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process. After all, this law was passed as the rule by which employers and workmen must order their daily lives. To translate this Act by a process of interpretation into an equivalent of the bills Congress rejected is, we think, beyond the fair range of interpretation. Declining that, we cannot sustain the Government's bill of complaint. *Reversed.*"

The Government in the court below sought to show by a quotation from the Report of the Committee on Military Affairs, House Report 36, 79th Congress, 1st Session (report on H. R. 1752) that Congress intended to deny all judicial review in defense to an indictment charging one with a violation of the Act. This report of the Committee merely noted the construction placed upon the Act by the courts. It did not attempt to say what Congress intended in the passing of the Act four years previously. Indeed, the Court in the *Falbo* decision found there was no record of legislative intention. (p. 549, 554) Moreover, when H. R. 1752 [Report 36], 79th Congress, 1st Session, reached the floor of the House of Representatives, it had been amended so as to provide for judicial review. Section 4 of the Bill provided for amendment of Section 11 of the Act in the following language:

> "(b) in the case of an alleged violation of section 5 (n) (4), it shall be a defense to such alleged violation for the individual to show (1) that he made timely application for revocation or modification of the order under section 5 (n) (4), and (2) that the denial of the revocation or modification requested was not based on a fair consideration of his application."

This proposed amendment to the Act showed that the members of Congress who proposed the Bill were alarmed over the construction placed on the Act by the courts in denying a defense to one charged with a violation of an administrative order. Indeed, the Select Committee to Investigate Executive Agencies, in its Second Intermediate Report (H. R. 862, 78th Congress, 1st Session, p. 5), had already condemned and assaulted the decisions of the courts in criminal cases involving violations of administrative orders as an aberration. The Committee said, *inter alia*, "That a citizen may be indicted, tried, and convicted for violation of an illegal regulation or order made by an executive

agency, without having the right to plead such invalidity to the court where he is indicted and tried is, indeed, a novelty in our jurisprudence, and if sustained by the courts it should be immediately corrected by amending the act." In any event the later proceedings of Congress cannot be given retroactive effect to give an intention to acts of Congress long before enacted.

Due process of law requires that one charged with a violation of an administrative order be permitted to defend against the indictment on the ground that the order is void and violates his constitutional rights.

In *California* v. *Latimer*, 305 U. S. 255, it was intimated that one charged by indictment with refusal to comply with an administrative order would be permitted to defend and show that the act under which the order was made does not apply to the defendant. That case involved an original action by the State of California against the Railroad Retirement Board and the Commissioner of Internal Revenue to enjoin enforcement of the Railroad Retirement Act which provided: "Any officer or agent of an employer, . . . who shall willfully fail or refuse to make any report or furnish any information required, in accordance with the provisions of Section 10 (b) 4, by the Board . . . shall be punished by a fine of not more than $10,000 or by imprisonment not exceeding one year." The Bill was dismissed for want of equity. Mr. Justice Brandeis said, among other things: "Moreover, the Board is without power to enforce its regulations except by resort to legal proceedings, as provided in Sec. 10 (b) 4; and in any suit which it may institute to enforce the regulations, ample opportunity is afforded to defend, on the ground that the State Belt Railroad is not subject to the Railroad Retirement Act."

The Government in the court below indulged in a highly inflammatory argument for the purpose of getting the court off the real issue. It was said that those who have been illegally treated by the draft boards and given an illegal order were not "to be encouraged and rewarded with judi-

cial review merely because they refuse to complete the induction process at a later stage."

The purpose of this argument is that violations of the Act are to be discouraged by an outright denial of all legal defenses.

This is indeed an innovation. It is a new theory in criminal procedure which the Government would have this Court graft onto the law contrary to the spirit of the constitutional guarantees of procedural due process in criminal actions. If such a quest proves successful then a bridgehead has been made upon the field of criminal law which would allow courts to deny self-defense in murder cases, the defense of consent in rape cases, and hundreds of other defenses in all criminal cases, on the theory that the denial of defense would be a deterrent to the commission of crime. Cf. *Hovey* v. *Elliott*, 167 U. S. 409; *Windsor* v. *McVeigh*, 93 U. S. 274.

B

VIOLATION OF PROCEDURAL DUE PROCESS

Although the majority opinion of the court below did not discuss the matter, the Government contended that the Regulations do not authorize petitioner to complain of the refusal of the board to permit him to file additional evidence concerning his ministerial activity eighteen months after he had signed his appeal papers and two months before the file was forwarded to the board of appeal for review. Indeed, the Government says that a registrant has no right to file any additional information at any time after his appeal is taken regardless of whether his Cover Sheet has been forwarded to the board of appeal.

[6] The views herein advanced that the petitioner has been denied procedural rights of due process so as to enable him to challenge the validity of the commands based on the order to report for induction are fully supported by the ably stated views and cogent arguments advanced by Judge Biggs in his dissenting opinion fully concurred in by Judge Leahy. ( ) See Appendix, pages 15a-21a, *infra*.

Section 615.43 (a) of the Selective Service Regulations provides, *inter alia*, "*Every paper pertaining to the registrant* except his Registration Card (Form 1) *shall be filed in his Cover Sheet* (Form 53)."

Section 626.2 provides, *inter alia*, "The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, . . . *if such request is accompanied by written information presenting facts not considered when the registrant was classified* which, if true, would justify a change in the registrant's classification."

Section 626.3 provides, *inter alia*, "When a registrant, . . . files with the local board a written request to reopen and consider anew the registrant's classification and the local board *is of the opinion that the information accompanying such request fails to present any facts in addition to those considered* when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, should advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and should place a copy of the letter in the registrant's file."

Section 627.12 provides: "The person appealing *may attach to his notice of appeal* or to the Selective Service Questionnaire (Form 40) *a statement specifying the respects in which he believes the local board erred*, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, *and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.*"

Section 627.13 provides, *inter alia*, "Immediately upon completion of the actions required by paragraph (a) of this section, the local board shall attach the Individual Appeal

Record (Form 66) to the inside of the registrant's Cover Sheet (Form 53) and shall carefully check the registrant's file to make certain that all steps required by the regulations have been taken *and that the record is complete.*"

In Petitioner's Exhibit A, petitioner requested the reopening of his classification and the inclusion of his proffered additional information in his Cover Sheet. (167-168) In the alternative this letter was his written statement of appeal to which was attached additional "information which was offered to the local board and which the local board failed or refused to include in the registrant's file." (Section 627.13)

There is no time limit in Regulation 627.12 as to when the "statement" or the "information which was offered" and which the board "refused to include in the registrant's file" must be submitted by the registrant. The only reasonable limitation as to time of filing should be that the documents ought to be submitted to the local board before the cover sheet is forwarded to the board of appeal. For instance if a registrant went to his board in the morning to sign his appeal he would no doubt have the right to go back to the board on the afternoon of the same day and file his appeal statement or information not received by the board, provided the file had not been sent to the board of appeal.

By force of reason he could return on the next day, or during the next week, or the next month or even the next year to file these documents as long as his Cover Sheet was still with the local board and had not been forwarded to the board of appeal. Particularly is this true when the local board had not finished with his classification on account of not having ordered him to take a physical examination, as in this case. There is no question that when Estep offered the evidence to the board in 1944 some of the documents had been rejected by the board in 1942. Therefore under the Regulations he had the right to offer that as evidence which the board had refused him the right to file. Nor is section 627.12 confined to evidence offered

at a personal appearance. It is broad and unlimited and covers any evidence which may have been offered to the local board at any time before the file is sent to the board of appeal. If this construction is not placed on this regulation then it would be possible for the local board to usurp its prerogative under Part 626 which provides for submission of additional evidence upon reconsideration.

Thus if a local board rejected evidence offered on reconsideration the board of appeal, which considers classifications *de novo*, would be deprived of its right to correct errors committed by the local board under the regulations because the local board would have the unlimited power to withhold and keep from the board of appeal any evidence offered under section 626. (The new evidence offered in 1944, not submitted in 1942, was receivable under Section 626.) It seems to be inexorable that the local board must include in the registrant's file any additional evidence offered at any time before the file is forwarded to the board of appeal. This is especially true because the board of appeal makes all its determinations *de novo*. It should be the sole prerogative of the board of appeal to determine whether or not the additional evidence shall or shall not be incorporated in the file. At least the board of appeal should have the right to consider under Part 626 and Section 627.12.

Parts 626 and 627 of the Regulations are not for the sole use and benefit of the local board. The board of appeal has some rights under these sections. Those rights it was, by the local board's action, prevented from exercising. The local board performs a function very much like a master, referee or a notary public taking a deposition because it is for the board of appeal to pass on all question involved. Indeed, if the Government's contention were correct, the local board would have unlimited discretion to determine just what the board of appeal can or cannot consider under Parts 626 and 627 of the Regulations.

It is submitted that the action of the local board was a

violation of the Regulations which could not be cured by the classification of Estep by the board of appeal unless the board of appeal had the opportunity to pass upon the action of the local board in excluding the evidence. Since the board of appeal knew nothing of the illegal action of the local board it was impossible for it to take action to correct the usurpation of power by the local board.

Furthermore, the alleged ambiguity of the Regulations cannot be used to justify the action of the local board. Even in absence of any regulations as to the right to file additional evidence the registrant would have the right, under the circumstances of this case, to submit additional evidence in view of the long lapse of time from the date of classification to the date of sending the papers to the board of appeal. Indeed, the due process clause of the Fifth Amendment requires such a conclusion and compels a construction to be placed upon the Regulations similar to that adopted by the Selective Service System in the *Rinko* case, because the action of the board of appeal is *de novo*. *United States* v. *Pit* (CCA-3) 144 F. 2d 169.

The Regulation mentioned on page 29 of "Appellant's Appendix" filed in the court below is Section 627.13, which provides, *inter alia*, "If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a summary, *the local board shall be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision.*" In the Estep case the board's letter (Petitioner's Exhibit M, p. 223 of "Appellant's Appendix") was not a summary of any facts not reduced to writing. It was a prejudicial statement and argument made in face of the record against Estep—made for purpose of influencing the board of appeal, contrary to the Regulations.

Assuming, *arguendo*, that Estep's going to the end of the selective process by refusing to submit to the induction

ceremony does not exhaust the remedies sufficiently to entitle him to challenge the erroneousness of his classification, there is nevertheless a different problem presented here. The withholding of evidence by the local board denied the final and real classifying agency of the Selective Service System the right to a full review of appellant's case. The act of the local board was tantamount to a denial of the right of appeal. It is a denial of procedural due process so as to make the order upon which the indictment is based void and the same as though no order had been issued at all. Under these circumstances the courts have held that the illegality of the order can be considered in defense to the indictment and that the doctrine of *Falbo* v. *United States, supra,* does not apply. *Tung* v. *United States* (CCA-1) 142 F. 2d 919. The decision of the court below conflicts directly with the *Tung* decision. Cf. *United States* v. *Peterson* (USDC-ND Calif.) 53 F. Supp. 760; *United States* v. *Lair* (USDC-ND Calif.) 52 F. Supp. 393; *Ex parte Stanziale* (CCA-3) 138 F. 2d 312. It should be observed in the *Tung* case that the Government accepted the decision of the First Circuit as the law by not applying for certiorari, which was available to it.

The Government attempted to lead the court below to believe that the *Rinko* case also involved the issue of procedural due process exactly like the one here involved and that such contention was overruled by the Seventh Circuit Court of Appeals. (See Supp. Br. for Appellee, p. 24, filed in the court below.) In this connection, it must be said that Rinko did not contend that there was a denial of procedural due process as claimed by the Government. Although the local board in the *Rinko* case did exactly the same as did the local board in this case by denying Rinko the right to file additional evidence, the chicanery of the local board was called to the attention of the board of appeal and the State Director of Illinois who directed that the rejected evidence be placed in the file on appeal for consideration by the board of appeal. (See Appendix, this brief, pages 31a-37a, *infra.*)

This was done. Accordingly, the due process question was cured in the *Rinko* case before it got into the courts and it could not be raised and was not considered by the district court, the circuit court of appeals or this court.

Conclusion

It is submitted that this case is one calling for the exercise by this Court of it's supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the assigned errors committed, and the judgment rendered by the Circuit Court of Appeals and the District Court against petitioner should be reversed and petitioner discharged, or, in the alternative, the judgments should be reversed and a new trial ordered.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioner

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 8810. October Term, 1944.

UNITED STATES OF AMERICA

v.

WILLIAM MURRAY ESTEP,
Appellant.

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Before PARKER, BIGGS, MARIS, GOODRICH and MCLAUGHLIN, *Circuit Judges*, and LEAHY, *District Judge*.

OPINION OF THE COURT

(Filed July 6, 1945.)

By GOODRICH, *Circuit Judge*.

Defendant, Estep, one of Jehovah's Witnesses, was indicted for failure to obey an order of his local board directing him to appear and be inducted into the United States Navy (50 U. S. C. A. Appendix § 311), and was found guilty. Estep had appeared at the induction center, after having been examined and found acceptable, and was told to "take one step forward" [1] constituting his induction into the Navy. He refused, giving the officer in charge a letter in which he asserted that as "a regular or duly ordained minister of religion" he was entitled to exemption from training and service by reason of Section 5 (d) of the

[1] Directive of the Bureau of Navy Personnel, June 2, 1944, Circular Letter No. 11-44, provides for this method of induction.

Selective Training and Service Act of 1940 as amended, 50 U. S. C. A. Appendix § 305 (d).

The facts are as follows. On June 30, 1942, Estep registered. Subsequently he filed his questionnaire in which he claimed to be a minister and entitled to IV-D status. The local board unanimously classified him I-A; he appeared before the board claiming IV-D classification. This was refused; and on October 27, 1942, he filed notice of appeal. Shortly thereafter, he attempted to file three affidavits corroborative of his activities as a minister of religion which the chief clerk refused, a refusal which the defendant asserts violated Section 615.43 of Selective Service regulations.[2]

On cross-examination at the trial, the United States Attorney objected to the attempt by Estep's counsel to determine whether the clerk had lied as to the whereabouts of Estep's file; he was sustained. It is claimed this was error if for no other reason than the credibility of the witness was involved in the question, but retrial on this ground alone was waived. The file or Cover Sheet was actually lost and apparently not found until early in 1944.

On February 22, 1944, Estep wrote to the local board stating that so far as he knew his case was being considered by the appeal board and that he did not wish to add to his file as it contained full explanation of his position. On April 19, 1944, Estep was directed to report for pre-induction physical examination; he was found fit for service and acceptable by the Navy. On May 23, 1944, Estep wrote to the local board stating he had examined his file and found certain documents missing; he inclosed eleven affidavits;[3] and he repuested reconsideration of his I-A classification.[4]

[2] Selective Service Regulations, Section 615.43, provide in part: "Every paper pertaining to the registrant except his Registration Card • • • shall be filed in his Cover Sheet • • • ".

[3] This letter and accompanying documents are marked "Deft's Ex. 'A', 12/7/44 H. T.", but were not admitted in evidence despite this designation. However, the brief of the United States refers to these documents as though in evidence and in fact sent to appeal board by local board.

[4] Selective Service Regulations, Section 626.2, provide in part: "The local board may reopen and consider anew the classification of a registrant • • • upon the written request of the registrant • • • , if such request is

Of all the documents in his file these alone were not stamped; the chief clerk testified they were in the file but "not a part of his file." On July 28, 1944, Estep's file was forwarded to the appeal board. Accompanying it was a letter by the assistant clerk of the local board asserted to be violative of Section 627.13 (b) of the Regulations.[5] On August 2, 1944, the appeal board unanimously classified Estep I-A and ordered him to report for induction on September 11, 1944. The events transpiring at the induction center have already been set out.

Estep asserts denial of due process of law by those charged with administering the Selective Training and Service Act. He contends that the local board's "Order to Report for Induction" was without legal sanction; that he had exhausted the Selective Service process; and that he was entitled to raise these matters as a defense in his trial on the criminal indictment for violation of the Selective Service Act.

In one of the earlier decisions applying the Selective Service Act, this Court said in United States v. Grieme, 138 F. (2d) 811 (C. C. A. 3, 1942), "We think it is clear that, if a local draft board acts in an arbitrary and capricious manner or denies a registrant a full and fair hearing, the latter, although bound to comply with the board's order, may, by writ of habeas corpus, obtain a judicial determination as to the propriety of the board's conduct and the character of the hearing which it afforded. The registrant may not, however, disobey the board's orders and then defend his dereliction by collaterally attacking the board's administrative acts." See also Ex Parte Stanziale, 138 F. (2d) 312 (C. C. A. 3, 1943), cert. den. 320 U. S. 797 and United States v. Pitt, 144 F. (2d) 169 (C. C. A. 3, 1944).

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accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification * * *"

[5] Selective Service regulations, Section 627.13 (b) provide in part: "In preparing * * * a summary [of the written information in registrant's file], the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision."

The Fourth Circuit took a somewhat different view in Goff v. United States, 135 F. (2d) 610 (C. C. A. 4, 1943). In Falbo v. United States, 320 U. S. 549 (1944), the Supreme Court referred to the conflict and adopted the view stated in the Grieme case, supra. Even before the Falbo decision, supra, the same principle had been recognized. In the concurring opinion in Hirabayashi v. United States, 320 U. S. 81 (1943), Mr. Justice Douglas regarded it as settled law, and cited the Grieme case, supra, among others, as an instance in the law where "one must obey an order before he can attack as erroneous the classification in which he has been placed." And in the Falbo case, the Supreme Court held that Congress has not "authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process • • • ".

Defendant accepts the Falbo decision, as of course he must. But he contends that the "last step in the selective process' is acceptace by the military forces after pre-induction examination, and appearance at local board and induction center, rather than actual induction into service. For this he relies heavily on the decision in Billings v. Truesdell, 321 U. S. 542 (1944) which followed less than four months after the Falbo decision. The holding in the Billings case was that a man is not subject to military law or discipline until inducted and he is not inducted when accepted by the military but only when he has undergone the formal induction ceremony. The distinction thus made between acceptance and induction serves defendant as a basis for his contention that acceptance completes the administrative process, and that thereafter judicial review of classification can be called for.

In deciding when the administrative process is completed, it is relevant to keep in mind what all the activity is for. It is not ceremonial ritual, nor was it designed to provide committee activity for citizens of the various com-

munities. It was, and is, designed to provide an Army and a Navy in a time of national emergency. The language of Congress, of the Supreme Court, and of those responsible for the administration of the selective service system, all make this clear.

In the first words of the Act itself, Congress declared it "imperative to increase and train the personnel of the armed forces of the United States." 50 U. S. C. A. Appendiz § 301 (a). The Supreme Court, taking note of Congressional intent in the Falbo case, emphasized that "the Act was passed to mobilize national manpower with the speed which that necessity and understanding required."

Couple these statements with the fact that the Act contains no explicit provision for judicial review prior to induction and Congressional design becomes manifest. The needs of the country come before those of the individual. Public necessity outweighs temporary individual inconvenience, even, it may be admitted, imposes considerable individual hardship in some cases. We cannot force the recruiting of the armed forces to wait while a civilian litigates his own private claims. Until a man is actually inducted he remains a civilian and military need is unsatisfied. The Billings case, far from being of aid to defendant, only makes it clearer that civilian status remains unchanged until induction actually takes place. So far as achieving what Congress intended is concerned, it makes no difference whether a man refuses to register, or to fill out a questionnaire, to report to local board or induction station, or refuses to be inducted. In any event, the end is not achieved while the man remains a civilian. Until he is inducted the administrative process has not been exhausted. Until it is, the registrant may not challenge validity of the local board's order in court.

The intent of the Act is further reflected in the Selective Service Regulations which provide in part that an order to report for induction carries with it the duty "to

report for induction"[6] and "to submit to induction". The order is clearly part of the administrative process which is not exhausted until the order is fully obeyed. Partial obedience is not exhaustive. We think the explicit language of the Regulations is in accord with what seems to us the clear Congressional purpose of the Act.

The Falbo case, supra, goes much further than establishing a mere procedural requirement. The principle laid down, as already noted, is based on Congressional intent concerning necessity of uninterrupted speed in fulfilling the local board's orders, for complete achievement of national defense. As was pointed out in Smith v. United States, 148 F. (2d) 288 (C. C. A. 4, 1945): "Among the advantages in cases such as this of limiting the remedy of the draftee to habeas corpus proceedings commenced after the administrative process has been completed is that * * * questions which are primarily constitutional in character are heard before a judge without the distractions and uncertainties likely to accompany a criminal jury trial. Constitutional rights of citizens must, of course, be preserved in war as well as in peace; but the procedure outlined in the Falbo and Billings cases enables the courts to preserve without unduly interfering with the war effort."

Still another consideration has been presented by Connor and Clarke, Judicial Investigation of Selective Service Action, (1945) 19 Tulane Law Review 344: "* * * a criminal proceeding presents an inappropriate forum for testing selective service action. This is evident because if the alleged improper or illegal action were not established as a defense nothing remains for the court to do but to fine or imprison the defendant, and the latter penalty is usually imposed. In any case the armed forces have lost a unit of manpower, whereas if the hearing is on a petition for the writ of habeas corpus the petitioner would in such a case be returned immediately to military control to begin his train-

[6] Selective Service Regulations, Section 633.21 (a).
[7] Selective Service Regulations, Section 633.21 (b).

ing. On the other hand, if the allegations of the defendant in the criminal proceedings were sufficiently convincing to justify acquittal he is discharged, but the same result obtains when the hearing is on the writ of habeas corpus."

After the Falbo and Billings cases, supra, a number of cases arose in the various circuits. One case, Tung v. United States, 142 F. (2d) 919 (C. C. A. 1, 1944) must be distinguished for there the defendant, "had not somewhere along the line by choice abandoned the administrative remedies given him by the Act, but instead was attempting to pursue them [by means of appeal]." There followed a series of cases where the registrant had not gone quite as far toward completion of the administrative process as in the instant case. Defendant either did not report to induction station or to the local board. See for example: Giese v. United States, 143 F. (2d) 633 (U. S. Ct. of App., 1944), affirmed, Per Curiam, 323 U. S. 682; Enge v. Clark, 144 F. (2d) 638 (C. C. A. 9, 1944); Bagley v. United States, 144 F. (2d) 788 (C. C. A. 9, 1944); United States v. Madole, 145 F. (2d) 466 (C. C. A. 2, 1944); Biron v. Collins, 145 F. (2d) 759 (C. C. A. 5, 1944); Goodrich v. United States, 146 F. (2d) 265 (C. C. A. 5, 1944); Tatum v. United States, 146 F. (2d) 406 (C. C. A. 9, 1944); Shigeru Fujii v. United States, 148 F. (2d) 298 (C. C. A. 10, 1945); Klopp v. United States, 148 F. (2d) 659 (C. C. A. 6, 1945). In still another case, Harris v. Ross, 146 F. (2d) 355 (C. C. A. 5, 1944), habeas corpus was properly brought after induction to test lack of due process. In all of these cases the ratio decidendi was that of the Falbo case, as we have interpreted it.

Two decisions present facts squarely in point with the instant case. United States v. Flakowicz, 146 F. (2d) 875 (C. C. A. 2, 1945), cert. den. April 30, 1945, and United States v. Rinko, 147 F. (2d) 1 (C. C. A. 7, 1945) cert. den. April 30, 1945. In each instance defendant was found "acceptable" after reporting for examination but refused to submit to induction. In the Rinko case, supra, the attempt to characterize the Billings case as a limitation of the

Falbo doctrine failed, because the court thought "it is unreasonable to suppose that the court intended thereby within less than 90 days following the Falbo decision to announce any different procedure than that approved in the Falbo decision—at least not by implication."

In Smith v. United States, 148 F. (2d) 288 (C. C. A. 4, 1945), another issue was involved in the case and in part determined its conclusions. The general rationale, however, flowed clearly from the Falbo doctrine so far as it could be applied to the facts of that case. Specifically the Smith case stated, "the administrative process is not exhausted until the order of the board is complied with, which, as we have seen, embraces submitting to induction."

Our conclusion does not make a trap of the Falbo case. While defendant must report to the military in order to exhaust his administrative remedies, this does not mean that he can be forcibly inducted; nor does it mean that his induction is an exercise of free will and untrammeled choice. It simply means that when defendant submits to induction to exhaust administrative procedure he does so, under protest of the military's rights to hold him, as a duty of co-operation in effective law enforcement. Such submission is far different from either voluntary induction or forcible induction. Admittedly, under the Billings decision, forcible induction is no induction at all. And admittedly, where there is a voluntary submission to the authorities, habeas corpus cannot be brought because there can be no deprivation of freedom through a voluntary act.[8] But to submit under a command of law good at face value is not voluntary submission such as will bar judicial review. The law knows a number of situations, even in peacetime, where submission is regarded, as it should be here, as a duty of co-operation in effective law enforcement rather than as a voluntary submission such as will bar judicial review. "Thus it is his duty to submit to arrest, upon a warrant

[8] See Baker v. Grice, 169 U. S. 284 (1897); Ex Parte Simon, 308 U. S. 144 (1939); United States v. Peckham, 143 Fed. 625; Ex Parte Ford, 160 Cal. 334, 116 P. 757.

valid on its face, even though the warrant may turn out later to be invalid. A citizen who resists arrest under such circumstances may subject himself to punishment for so doing, in spite of his complete innocence of the original accusation upon which the warrant was issued. So, also one who is held upon a commitment, valid on its face, may be guilty of escape if he forces his way out of custody, even though the commitment, when properly challenged, may prove to be insufficient. Again, one who is a fugitive from a State in which he is unjustly accused of crime may, nevertheless, be subjected to extradition if the indictment and requisition are in proper form. And he may become guilty of a crime, under the federal law, merely by fleeing to another State to escape prosecution." Giese v. United States, 143 F. (2d) 633, 635 (D. C. Ct. of App. 1944) affirmed, Per Curiam, 323 U. S. 682. The court, in the opinion from which this quotation is made, further points out, the order to report is comparable legal process valid on its face.

There is no need to confine ourselves to the broad principles derived from analogy alone, however. There are sufficient decisions under the Selective Training and Service Act to make it clear that a man may submit to induction without losing his right to review by habeas corpus. It should be stated, in frankness, that the point has been assumed, rather than discussed by the courts. That fact, we believe, does not weaken the force of the decisions in showing the judicial attitude on the point. Harris v. Ross, 146 F. (2d) 355 (C. C. A. 5, 1945); Smith v. United States, 148 F. (2d) 288 (C. C. A. 4, 1945); United States ex rel. Reel v. Badt, 141 F. (2d) 845 (C. C. A. 2, 1944); United States ex rel. Brandon v. Downer, 139 F. (2d) 761 (C. C. A. 2, 1944); United States ex rel. Phillips v. Downer, 135 F. (2d) 521 (C. C. A. 2, 1943); Bagley v. United States, 144 F. (2d) 788 (C. C. A. 9, 1944) (dictum); United States v. Bowles, 131 F. (2d) 818 (C. C. A. 3, 1944) (dictum); affirmed 319 U. S. 33; Drumheller v. Berks County Local Board No. 1, 130 F. (2d) 610 (C. C. A. 3, 1942) (dictum);

Rose v. United States, 129 F. (2d) 204 (C. C. A. 6, 1942) (dictum). In the District Courts the principle has been recognized even more than in the Circuit Courts. Ex Parte Stewart, 47 F. Supp. 410 (D. C. Cal. 1942); U. S. ex rel. Bayly v. Reckord, 51 F. Supp. 507 (D. C. Md. 1943); U. S. ex rel. Altieri v. Flint, 54 F. Supp. 889 (D. C. Conn. 1943), affirmed 142 F. (2d) 62; Micheli v. Paullin, 45 F. Supp. 687 (D. C. N. J. 1942); U. S. ex rel. Mauro v. Downer, 50 F. Supp. 412 (D. C. N. Y. 1943); In re Rogers, 47 F. Supp. 265 (D. C. Tex. 1942). Both as a matter of broad principle and actual application habeas corpus is firmly rooted in the law as a post-induction remedy that is not defeated by the fact of obedience to orders by the inductee.

The judgment of the District Court is affirmed.

BIGGS, *Circuit Judge*, dissenting.

The defendant, Estep, contends that he was denied due process of law by the Selective Service agencies and that the trial court also denied him his constitutional rights by ruling that he might not interpose the asserted invalidity of the order requiring him to report for induction as a defense to his indictment. I conclude for the reasons hereinafter stated that Estep was denied due process of law by the Selective Service agencies, that the order requiring him to report for induction was invalid and that the trial court erred in not permitting the defendant to assert this as a defense to his indictment. As I read the opinion of this court, the majority conclude that even if Estep was denied due process of law by the Selective Service agencies he may not raise this issue as a defense at his trial but must submit to induction and then seek relief by way of application for a writ of *habeas corpus*.

I shall call attention to certain facts which I think require particular consideration since, in my opinion, they show that Estep was denied due process of law by the

Selective Service agencies and by the court below in an erroneous interpretation of the existing law. Some of the circumstances appear from evidence received by the court below; others, from the offer of proof made by the defendant during the course of the trial. For the purposes of this appeal, the matter contained in the offer of proof must be deemed to be true. Substantially all of it is documentary and its probative force may not be seriously controverted. I shall treat the proof in evidence and that contained in the defendant's offer as if they were one except for occasional specific references.

Estep, a member of the sect of Jehovah's Witnesses, was found guilty on an indictment charging him with failure to obey an order of his local board directing him to appear and be inducted for training and service in the United States Navy. Estep at the induction center and when his name was called so that he might "take one step forward"[1] to constitute his induction into the Navy, he refused to take that step. Estep gave a letter to the officer in charge, stating his reasons for refusing induction. In this letter he asserted that he was "a regular or duly ordained minister of religion" and entitled to exemption from training and service by reason of Section 5 (d) of the Selective Training and Service Act of 1940 as amended, 50 U. S. C. A. Appendix § 305 (d). Estep's course was patterned on that of Billings. See Billings v. Truesdell, 321 U. S. 542. Compare the circumstances of United States v. Pitt, (CCA 3) 144 F. 2d 169.

Estep registered on June 30, 1942. His questionnaire was received by the local board on August 22, 1942. He stated in his questionnaire that he was a minister and claimed a IV-D classification. On October 3, 1942, the local

[1] A directive from the Bureau of Navy Personnel under date of June 22, 1944, Circular Letter No. 11-44, provides that the registrants assigned to naval service must be informed of the imminence of induction and that the inducting officer will then state to them: "You are now about to be inducted into the United States Navy. You will take one step forward as your name is called and such step will constitute your induction into the United States Navy."

board by the unanimous action of its members classified him as I-A. On October 21, 1942 Estep appeared before the board and stated his reasons why he believed he was entitled to a IV-D classification. The following day the board informed Estep that after considering his case it refused to change his classification. On October 27, 1942, Estep wrote a letter to the board in which he stated, "I hereby file notice of appeal from classification I-A to classification 4-D." At a date not clear from the record but shortly after the date last mentioned, Estep went to the office of the local board and endeavored to file three affidavits, executed respectively by C. R. Hessler, by Earl Ferree, and by William G. Reese. Hessler, Ferree and Reese were members of the sect of Jehovah's Witnesses and the subject matter of their affidavits was corroborative of Estep's assertion that he was a regular minister of religion. Estep had filed with the local board a copy of his certificate of association with the Watchtower Bible and Tract Society. The affidavits of Hessler, Ferree and Reese, the copy of the certificate of association aside, constituted the only corroboration offered by Estep of his asserted status as a minister of religion up to that time. The affidavits, though included in the offer made by Estep's counsel at his trial, were not received in evidence.

The chief clerk of the local board refused to accept the affidavits, stating, according to Estep's testimony, that the board could not receive them because Estep's case was before the appeal board. On cross-examination at Estep's trial the chief clerk was asked the reason for his refusal to receive the affidavits. He replied that Estep had no right to file the affidavits since his case had come before the local board and had been "considered". He was then asked by Estep's attorney, "Mr. Clark, you told him that his file was before the appeal board?" He replied, "I might have told him that, yes." He was asked, "Then you told him a lie?" He answered, "Possibly." Estep's counsel then inquired, "Why did you tell him a lie?" The

question was not answered, for an objection interposed by the United States Attorney was sustained. Actually, at the time Estep offered the affidavits to the chief clerk, his cover sheet or file was lost. The file or cover sheet was not sent to the appeal board until 1944. Despite the fact that it was lost, an anonymous communication with a newspaper clipping attached, received by the local board in an envelope postmarked December 2, 1942, found its way into the cover sheet. When this anonymous communication was offered in evidence by Estep's counsel, apparently as proof of irregularity of the proceedings before the board, it was refused admission. The clerk of the local board also testified that Estep's file "came to light at the time . . . [Estep's] brother's case was before the Federal Court." This date is not in the record but the file or cover sheet apparently was found by the local board early in 1944.

On February 22, 1944 Estep wrote a letter to the local board in which he stated in part, "So far as I know my case is being considered by the Board of Appeal. I do not wish to add anything further to my file at this time as the information it now contains fully explains my position as a minister and sets forth by request for a minister's classification; that is, a IV-D classification."

On April 19, 1944 Estep was directed to report for a preinduction physical examination and was found fit for service and acceptable by the United States Navy. On May 23, 1944 Estep wrote a letter to the local board in which he stated that he had gone over his file in the office of the local board and ". . . found that certain statements which had been attached to my questionnaire; ministerial certificate from the Watchtower Bible & Tract Society . . . ; copy of 'Consolation' magazine . . . [and certain other documents] are all missing from my file. I have prepared copies of these letters and statements and attach them hereto." Estep also said in the letter, "I believe that Local Board No. 4 has not given sufficient consideration to my case, and I request that they again reconsider it and give me

my proper classification as a regular and duly ordained minister, namely, IV-D. In October 1942 I presented to the Local Board for filing in my file a sworn statement dated October 17, 1942, and affidavits from C. R. Hessler, Earl Ferree, and William G. Reese. At that time I was advised that my file had been sent to the Appeal Board and that these papers could not be added to the file. Apparently the file has not been sent to the Appeal Board as yet, and I enclose these affidavits and request that the Local Board consider them and add them to my file." Enclosed with the letter were eleven affidavits (those of Hessler, Ferree and Reese hereinbefore referred to and eight additional affidavits also corroborative of Estep's asserted status, all rejected by the trial court) and certain other documents which need not be described here. The chief clerk of the local board testified that Estep's letter of May 23, 1944 was in Estep's file "but is not part of his file". Neither the letter nor any of its accompanying documents is stamped with the stamp of the local board.

On July 28, 1944 Estep's file was forwarded to the appeal board.[2] It was accompanied by a letter written by an assistant clerk of the local board to the appeal board. The letter was received in evidence. It states in part, "Mr. Estep is not listed as a minister in any list yet submitted from National Headquarters of Selective Service. Although this registrant is not gainfully employed and devotes his time to the ministry, he does not contribute enough hours to this work to be considered a full-time minister since he works only three days a week in that capacity and is not justified to a 4-D classification." The minutes of Estep's hearing of October 21, 1942 before the local board supply the only evidence from which the board could infer that he devoted only three days a week to his work as a member of the sect of Jehovah's Witnesses. This evidence is slight,

[2] The reason for the additional delay in forwarding Estep's appeal to the appeal board does not appear from the record. The lost file or cover sheet had been found prior to April 19, 1944.

amounting to a little more than a scintilla. A transcript of the minutes of Estep's hearing before the local board, though offered in evidence by Estep, was rejected by the trial court.

On August 2, 1944 the appeal board by unanimous action classified Estep as 1-A.[3] He was ordered to report for induction on September 11, 1944.

Estep asserts as has been stated that he was denied due process of law by the tribunals and persons charged with administering the Selective Training and Service Act; because, in particular, his local board and those acting for it or pursuant to its authority did not adhere to the regulations promulgated under Section 10 of the Act, 50 U. S. C. A. Appendix § 310. He contends in effect that the corroborative material offered by him was not received by the local board and was not considered by the appeal board; that if it had been considered these tribunals would have concluded that he was a regular minister of religion and entitled to exemption from training and service. He asserts also that the letter of July 28, 1944, written on behalf of his local board to the appeal board prejudiced his case with the appeal board. For these reasons he contends that the

[3] On August 10, 1944 a letter was written by the legal adviser for the State Director of Selective Service to the chairman of the local board, which stated, "We are returning the cover sheet of the above registrant [Estep]. On August 2, 1944, the board of appeal affirmed your I-A classification of October 3, 1942. . . . We would appreciate being advised as to the reasons for delay in acting on this case and your returning the cover sheet to us with your letter of explanation. When you return the cover sheet, please obtain from the registrant a statement as to his precise activities as a Jehovah's Witness at this time, including the amount of time he now devotes, and his official title in that organization." On August 22 a clerk of the local board enclosed Estep's "complete file" and wrote that "The delay in acting on this case was through an oversight on the office force." The letter also states that a statement was obtained from Estep as to his activities as a Jehovah's Witness as of the date of the letter. This statement is not in evidence and is not included in any part of Estep's file or cover sheet with the local board, presently before us. On August 25 a letter was written by the Deputy State Director to the local board stating that ". . . it is apparent that there has been considerable irregularity in the handling of this case, and we are disturbed by the inadequacy of the explanation offered. . . ." The letter went on to say, "We are now particularly concerned in having the file perfected and in having the case further processed in accordance with the obvious requirements, in that you complete the 'Local Board' action on receiving decision of Board of Appeal . . . and proceed to order the registrant for induction . . ."

order of the local board directing him to appear for induction was without legal sanction; and that, having exhausted the Selective Service process, he was entitled to raise these matters at his trial as a defense to the indictment. Before proceeding to a discussion of the principles of law embodied in the decisions of the Supreme Court in Billings v. Truesdell, *supra,* in Falbo v. United States, 320 U. S. 549, and decisions of lower federal courts in other cases, it is necessary to refer to pertinent Selective Service Regulations and their application to the facts as stated.

Estep offered the first substantial corroboration of his activities as an asserted minister of religion of the sect of Jehovah's Witnesses to the chief clerk of the local board, albeit after he had appealed, at the end of October or the beginning of November, 1942. This material included the affidavits of Hessler, Ferree and Reese. The clerk refused to receive these affidavits on a ground unfounded in fact: Section 615.43 of the Selective Service Regulations provides in part: "Every paper pertaining to the registrant except his Registration Card . . . shall be filed in his Cover Sheet . . ." Estep testified that he offered the affidavits in order that they might be sent by his local board to the appeal board to be considered by the latter in disposing of his case. He did not, as he now asserts, seek at that time to have his classification reopened by the local board. Had he been aware of the fact that his cover sheet had not gone to the appeal board, he would have been entitled to insist that the affidavits be received by the local board and his case given further consideration.

In view of the fact that Estep's cover sheet or file had not gone forward to the appeal board, the local board should have received the affidavits and put them in the cover sheet as required by Section 615.43 of the Regulations. Perhaps, the chief clerk of the local board without warrant in fact permitted Estep's counsel at the trial to attribute to him a base motive when he agreed that "Possibly" he might have lied to Estep. The clerk may have

meant nothing more than that he was mistaken in telling the registrant that his file had gone to the appeal board. Inquiry into the clerk's motives was terminated by the objection interposed by the United States Attorney. The learned District Judge erred in sustaining this objection if for no other reason than because the question would have thrown light upon the credibility of the witness. At the reargument of this cause before the court *en banc* Estep's counsel stated that he waived this ground for a new trial. He made plain, however, that he did not retreat from his position that the misinformation given by the chief clerk of the local board to Estep as to the status of the latter's file was a denial of due process of law.

It may be pointed out that Estep on February 22, 1944, knowing that the proffered corroborative material had been rejected in 1942, wrote to the local board and stated that he did not wish to add anything further to his file. It could be contended that by this admission Estep showed himself to be content with the rejection of the affidavits of Hessler, Ferree and Reese, that he was satisfied with his file as then constituted and that therefore any breach by the local board of Section 615.43 became immaterial. But statements made by a registrant should not be treated as an exercise in polemics to end that he may be trapped by his own lack of logic. Since the chief clerk of Estep's local board either lied to him or materially misstated facts with the effect that the registrant concluded that this corroborative material could not be received and therefore could not be considered either by the local board or the appeal board I think it is necessary to conclude that Estep in this regard was not afforded due process of law by the local board.

Whatever may have been Estep's attitude in respect to the rejection of the proffered corroborative material in 1942, in his letter of May 23, 1944 Estep stated to the local board that he had examined his file and had found certain

documents to be missing. He enclosed with his letter[4] eleven affidavits designed to corroborate his assertion that he was a minister of religion. These included the affidavits of Hessler, Ferree and Reese and eight additional affidavits. Estep also stated in his letter that he believed that the local board had not given sufficient consideration to his case and requested reconsideration of his I-A classification.

Section 626.2 of the Regulations provides in part: "The local board may reopen and consider anew the classification of a registrant . . . upon the written request of the registrant . . . , if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification . . . " The material enclosed by Estep with his letter of May 23 to the local board was corroborative though it also presented facts which were not considered by the local board when it made its original classification. The affidavit of Oliver G. Cuppett, asserting that Estep was the "company servant for the Uniontown company" of Jehovah's Witnesses, will serve as an example. Of course it may not be said that a consideration of this material necessarily would have required a change in Estep's classification. It might or might not have worked this result but the question was one for the local board to decide upon receipt of Estep's request for reclassification and an examination of the material submitted by him.

It seems probable that the local board did not receive the affidavits as a part of Estep's file or consider his request. As has been stated, the chief clerk of the local

[4] Estep's letter of May 23, 1944 and the accompanying documents are marked "Deft's Ex. 'A', 12/7/44 H. T.", but they were not admitted in evidence despite this designation by the clerk or stenographer of the District Court. Nonetheless the United States Attorney refers to these documents as if they were in evidence and had in fact been sent to the appeal board by the local board. The brief of the United States states, "On May 22, 1944 he [Estep] sent, by registered mail, additional evidence to his Local Board with a request that same be placed in his file and forwarded to his Appeal Board. On July 28, 1944, his file was forwarded to the Appeal Board."

board testified that though the letter of May 23 and the affidavits were in Estep's file they were "not a part of his file", and it is notable that of all the papers contained in Estep's cover sheet these documents alone were not stamped with the stamp of the local board. Section 626.3 of the Regulations provides in pertinent part: "When a registrant . . . files with a local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified . . . , it shall not reopen the registrant's classification. In such a case the local board, by letter, should advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and should place a copy of the letter in the registrant's file." The local board wrote no letter to Estep as required by the Regulation last quoted. From all these facts the inference could be drawn that the local board did not consider Estep's request or pass upon the corroborative material sent to it by him. Consideration of Estep's request and eamined the corroborative material material offered by him was a duty imposed upon the local board by the Act and the Regulations. Inquiry into the question of whether or not the local board considered Estep's request and examined the corroborative material was prohibited by the ruling of the court below. If the local board did not consider Estep's request for reclassification or examine the corroborative material offered by him, in my opinion under the circumstances, it denied him due process of law. It should be pointed out that the registrant undoubtedly assumed, as he had the right to do, that his request for reclassification and the eleven affidavits had been included in his cover sheet. It is clear that in this instance Estep was not informed by the local board that this material was not to be included in his cover sheet.

The chief clerk of the local board stated categorically that the material referred to was not forwarded to the appeal board. It follows therefore that the appeal board's *de novo* consideration of Estep's case could not cure a denial to him of due process of law by the local board.

One final question relating to the Regulations remains for discussion. Section 627.13 (b) provides in part, "In preparing . . . a summary [of the written information in the registrant's file], the local board should be careful to avoid the epression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision." The letter of July 28 written by the assistant clerk of the local board to the appeal board, quoted in material part at an earlier point in this opinion, violated this section. The letter was argumentative and contained expressions of opinion as to the information in the registrant's file. The regulation states that the local board "should be" careful to avoid the expression of opinion and "should refrain" from including any argument in support of its own decision and that other portions of Section 627.13 and the Regulations generally use the auxiliary verb "shall". But the auxiliary verb "should" should not be considered as merely precatory.[5] It was the intent of the framers of the Regulations by Section 627.13 (b) to make certain that an appeal board in considering the classifications of a registrant would embark upon that consideration unaffected by any observation, opinion, or argument of a local board. The Selective Service Regulations were intended to have and do have the effect of law. See Smith v. Richart (D. C. E. D. S. C.) 53 F. Supp. 582; United States v. Reckord, (DCDM) 51 F. Supp. 507, 510-513; United States v. Downer (CCA 2), 143 F. 2d 125. For analogy see United States v. Eliason Administratrix, 16 Pet. 291, 302; Nordmann v. Woodring,

[5] Webster's New International Dictionary states, "*Should* is everywhere used in the same connection and the same senses as *shall*, as its imperfect."

28 F. Supp. 573, 576. Cf. Standard Scale Co. v. Farrell, 249 U. S. 571, 577.

It may be argued that Estep has not shown that his cause was prejudiced before the appeal board by the letter of July 28. Such an argument is not entitled to weight. The selectee at his trial should not be permitted to bring the members of an appeal board before the court to show the basis of their classification of him. The President, authorized by Section 10 of the Selective Training and Service Act to prescribe the necessary rules and regulations to carry out the provisions of the Act, delegated this duty to the Director of Selective Service who promulgated the Selective Service Regulations. See Executive Order No. 9410, of December 23, 1943, 8 F. R. 17,319. The agency charged with the administration of the Act promulgated the regulation with which we are presently concerned. From its terms, the conclusion is irresistible that the Director determined that the expression of opinion or argument in support of its decision by a local board to an appeal board might prove prejudicial to a registrant. We should not look behind this ruling. I conclude therefore that the action of the clerk of the local board in sending the letter of July 28 to the appeal board for consideration of its contents constituted a denial of due process of law to Estep.

Having reached these conclusions, it is necessary to find and apply the correct principles of law to the facts of the case at bar. This requires a discussion of the two leading decisions of the Supreme Court; viz., Falbo v. United States and Billings v. Truesdell, *supra*. It will be noted that after the date of the Billings decision the Selective Service process was changed so that registrants were given physical examinations prior to being ordered to report for induction. See the Act of December 5, 1943, 50 U. S. C. A. Appendix Section 304a. Estep, as we have stated, was given a physical examination and was found to be acceptable by the Navy. Following the Supreme Court's decision

in the Billings case, and perhaps because of it, the process of actual induction was altered so that selectees reporting at the induction center were required to take "one step forward" when invited to do so by the officer in charge, the "one step forward" constituting a selectee's actual induction into the Army or Navy. See note 1, *supra*. The Billings case holds that the selectee is not "actually inducted" within the meaning of Section 11 of the Act, 50 U. S. C. A. Appendix Sec. 311. In the Billings case Mr. "ceremony or requirements of admission" have been prescribed; that until "actually inducted" the selectee is subject solely to civil jurisdiction and therefore may not be tried by court martial. It follows that if the selectee refuses to take "one step forward" when directed to do so by the officer in charge of induction, that refusal would constitute a violation of the order of his local board to report for induction and, if that order is valid, the selectee will incur the penalties prescribed by Section 11 of the Act, 50 U. S. C. A. Appendix Sec. 311. In the Billings case Mr. Justice Douglas stated, 321 U. S. pp. 558-559; ". . . it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case by subjecting those who reported for completion of the Selective Service process to more severe penalities than those who stayed away in defiance of the board's order to report. These considerations together indicate to us that a selectee becomes 'actually inducted' within the meaning of § 11 of the Act when in obedience to the order of his board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed."

In the Falbo decision, 320 U. S. pp. 554-555, Mr. Justice Black stated that Congress was not required to provide ". . . for judicial intervention before final acceptance of an individual for national service." He went on to say, "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process. We think it has not. The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which indicates an intention to afford it. The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. . . . Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so."

Reading the Falbo decision in the light of Billings v. Truesdell, I think that the Supreme Court construed the Act to afford no judicial intervention to disrupt the Selective Service process but did not interpret its provisions to mean that there should be no judicial review of the Selective Service process when it had been completed. If it were otherwise how could the Falbo case serve as a "trap" to subject those who reported for completion of the Selective Service process to more severe penalties than those who stayed away from induction center in defiance of a board's order to report? The reference to a difference in possible penalties made by Mr. Justice Douglas is not an allusion to penalties which might be imposed by court martial as distinguished from those which might be imposed by civil tribunals for if the selectee refuses to report he remains subject to civil justice. I conclude therefore that Mr. Justice Douglas referred to the imposition of a penalty for failure to report for induction as distinguished from one imposed for refusal to be inducted after an order of a local

board requiring the selectee to report for induction. In the Falbo case Mr. Justice Black laid emphasis upon the necessity of not interrupting the Selective Service process, stating that there must be no litigious interruption of the process of selection which Congress had created; no intermediate challenge of orders to report.

But in the case at bar Estep exhausted the administrative procedures.[6] The Selective Service process was completed up to the final "one step forward" that a selectee must take to constitute his induction into the Armed Forces. At this point determination of the issue of whether or not a selectee had been awarded due process of law by the Selective Service agencies would not, in my opinion, constitute litigious interruption of the process of selection or an intermediate challenge to an order to report for induction. The question is not free from doubt, but as I read the Falbo and Billings decisions there may be judicial intervention to determine whether the selectee has been afforded due process if he be indicted for his refusal to be inducted. The Selective Service process having been completed to this point, if judicial intervention is ever permissible to protect a constitutional right it is here. If judicial intervention may not be availed of by the selectee at this juncture, it will never be available for the "one step" which the registrant must take to constitute his induction is a "voluntary" one. The word "voluntary" is used for want of a more apt adjective. While the one step forward is compulsory in the sense that the selectee is compelled to take it or become liable to the sanctions and penalties imposed by Section 11 of the Act, none the less the step forward is voluntary in that the selectee is under no physical compulsion to take it. He takes the step forward or does not take it as his will dictates. The statement of the inducting officer to the selectees, "You will take one step forward as your name is called and such step will constitute your

[6] It will be observed that Estep had no appeal to the President for the actions of both the local board and the appeal board were unanimous.

induction . . ." cannot be deemed to be a command for the selectee is not yet subject to martial authority. See the language of the Billings opinion quoted above. The words of the inducting officer therefore are nothing more than a request to the selectee that he take one step forward to constitute his induction.

If the selectee takes the step he subjects himself to the jurisdiction of the naval or military authorities and thereafter cannot avail himself of the writ of *habeas corpus* to test the question of whether the Selective Service agencies have afforded him due process of law for by subjecting himself to induction the selectee has deprived himself of his right to claim that he is subject to unlawful restraint by the naval or military forces. See McNally v. Hill, 293 U. S. 131 at p. 138, where Mr. Justice Stone stated, "Without restraint of liberty, the writ will not issue. . . . Equally, without restraint which is unlawful, the writ may not be used." If the selectee takes the one step forward he cannot thereafter assert that he did so under protest for, as we have shown, the inducting officer merely invites him to take the step. Compare United States v. Powell, 38 F. Supp. 183, 186. An analogy is presented by those cases in which the submission to custody was voluntary for the purpose of procuring the writ. See Baker v. Grice, 169 U. S. 284, 293-294; *Ex parte* Simon, 208 U. S. 144; United States v. Peckham, 143 F. 625; *Ex parte* Ford, 160 Cal. 334, 116 P. 757. See 39 C. J. S. Habeas Corpus § 10 and the authorities therein cited and 25 Am. Jur., Habeas Corpus, § 25. Cf. *Ex parte* Beach, 259 F. 956. It is the weight of authority that a writ of *habeas corpus ad subjiciendum* may not be awarded where the submission to restraint is voluntary. If the selectee who took the step forward thereafter refused to obey a lawful command of his superior officer and was held for court martial, it seems settled that he would not be entitled to be set at liberty by the writ. He would then be regularly in the custody of the military or naval authorities which would have juris-

diction to try him by military law for a military offense. Under such circumstances the civil courts could not intervene on his behalf. See United States v. MacDonald, 265 F. 695; *Ex parte* Dostal, 243 F. 664; *Ex parte* Beales, 252 F. 177; *Ex parte* Rock, 171 F. 240; and *In re* Davison, 21 F. 618.

It follows therefore that if the order of the local board directing the selectee to report for induction is invalid for any reason, unless the selectee can assert that invalidity as a defense to an indictment, he is indeed entrapped. Compare the decision of this court in United States v. Grieme, 128 F. 2d 811, and the very numerous decisions of like tenor. See for example United States v. Van den Berg, (CCA 7) 139 F. 2d 654; United States v. Sauler, (CCA 7) 139 F. 2d 173; and Harper v. United States, (CCA 5) 138 F. 2d 538. Cf. United States v. Rinko, (CCA 7) 147 F. 2d 1, and United States v. Flakowicz, (CCA 2) 146 F. 2d 874. I conclude that if the Selective Service process has been completed by the Selective Service agencies and the only incident remaining is submission to induction by the selectee, the selectee, who has refused induction, is entitled to assert as a defense to his indictment under Section 11 of the Act a denial to him of due process of law. No distinction can be made between the validity of the punitive sanctions imposed by Section 11 of the Act when invoked solely by reason of the violation of an induction order and the validity of the induction order itself. The punitive sanctions may not be said to be unassailable even though the induction order, the violation of which is the sole basis for imposition of the sanctions, is a mere nullity. If the induction order is a nullity because it has been directed to a selectee after failure of the Selective Service agencies to afford him due process of law, the punitive sanctions of Section 11 may not be imposed validly. Cf. *Ex parte* Catanzaro, (CCA 3) 138 F. 2d 100, 102, *cert. den.* 321 U. S. 793, and *Ex parte* Stanziale, (CCA) 138 F. 2d 312, *cert. den. sub. nom.* Stanziale v. Paullin, 320 U. S. 797. To hold other-

wise would be to deprive the registrant or selectee of his rights under the Selective Training and Service Act. Cf. United States v. Pitt, (CCA 3) 144 F. 2d 169, 173. No matter how arbitrary, capricious or biased the action of the Selective Service agencies might be, no relief could be afforded the selectee.

I can see no reason for concluding that Congress did not intend to afford complete protection to the selectee within the framework of the Selective Training and Service Act. Section 11 provides for the trial by the civil authority of any person who violates the Act and who has not been "actually inducted." In the Billings case, as has already been pointed out, the Supreme Court made it clear that the selectee was not subject to the military or naval jurisdiction until he underwent whatever "ceremony or requirements of admission" have been prescribed. If the selectee who has not been inducted may not be tried by court martial and must be tried by the civil authority, how can he ever assert denial of due process of law to him unless he can raise it as a defense at his trial? The majority of this court insist that the inducted man may raise the defense on application for writ of *habeas corpus*. Assuming (as I think is not the case) that having voluntarily submitted himself to the naval or military authorities the writ would lie on the inducted man's behalf, the ruling of the majority none the less renders the pertinent provisions of Section 11 meaningless for the statute requires the trial of the alleged delinquent in a criminal proceeding in a district court of the United States. If the defendant in such a proceeding, having exhausted his administrative remedies, cannot question the validity of the order upon which the punitive sanction sought to be applied to him is based, why should Congress require him to be tried in a court where such a defense would be available? Moreover, if the selectee who has not submitted to the military or naval authority cannot raise the defense of denial of due process of law at his trial, he can never raise it.

What has been said does not mean that a selectee may retry his classification on his indictment before a district court of the United States, or that he may adduce evidence at his trial to prove that he is a regular or ordained minister of religion entitled to exemption pursuant to the provisions of Section 5 (d) of the Act. These courses are prohibited to him. Evidence as to his status, if he claims exemption, must be submitted to his local board. He may offer evidence at his trial as a defense to the indictment that the Selective Service agencies, the local board or the appeal board, arbitrarily or capriciously refused to receive or consider evidence which he endeavored to submit as to his status. He may show by the material within his cover sheet that the local board or appeal board acted capriciously or arbitrarily in refusing to award him the status of an exempt registrant. He may produce evidence in court that material relevant to his status, timely offered by him, was rejected. He may show that members of the local board or appeal board are biased, prejudiced or disqualified under the Selective Service Regulations to sit in his case. He may show any or all of these things at his trial as proof that he was denied due process of law by the Selective Service agencies. Beyond this, he may not go.

Whether the selectee has or has not been afforded due process of law by the Selective Service agencies is a question of law for the court and must be determined by it as a legal conclusion though disputed questions of fact of course must be determined by the jury under proper instructions. A pure question of law arose in the case at bar in respect to the letter of July 28, 1944, admittedly sent by the local board to the appeal board. For analogy see United States v. Reckord, 51 F. Supp. at p. 510.[7] Because of the

[7] Judge Chesnut stated, "My *conclusion of law* is that the action of the Local Board in intentionally disregarding the applicable regulation and directive and thus including the petitioners in the July quota list was legally arbitrary and capricious; and the petitioners are entitled to be . . . released from custody."

letter of July 28, 1944 the trial court should have directed a verdict in favor of the defendant. If it were not for what I deem to be the legal effect of the letter, I would conclude that this court should reverse the judgment and remand the cause for a new trial in order that the other questions which I have referred to might be determined after submission of the rejected evidence. In view of the letter of July 28 it would be futile to order a new trial in the case at bar.

The judgment of conviction should be reversed. A reversal would not exempt defendant from prompt and proper action by the Selective Service agencies.

LEAHY, *District Judge*, concurring in the dissent.

I fully concur in the dissenting opinion of Judge Biggs that Estep was denied due process. Instead of reversing the judgment of conviction I think a new trial should be ordered.

Estep did not get an opportunity to prove at his trial that he had failed to get due process before the draft boards. It is novel doctrine that a constitutional right depends upon what procedural technic is selected for its protection or that Congress by enactment of the Selective Service Act or any other statute may regulate the protection of any one of the master rights given by the Constitution. Neither am I convinced the Supreme Court has made it law that Estep may only challenge invasion of his constitutional right of due process by submitting to an oath of induction and then applying for a writ of habeas corpus.

When indicted for crime, it is always permissible to bring a plea of constitutional infringement before the trial judge for his critical examination. If this is not so, then protection of constitutional rights must depend upon formalistic considerations of selection of the proper writ or forum where one may tell the story of denial of such

rights. If one compelled to stand criminal trial is not to be permitted to be heard on the *fact* of absence of due process, then the right is illusory. If the Court's views are accepted, Estep has lost his right to demand due process by default because he lacked the ability to distinguish between Falbo v. United States and Billings v. Truesdell. It is my view that the trial judge should have made inquiry upon the proffer of proof to ascertain if Estep did or did not receive due process. This, he failed to do.

A new trial should be ordered.

Correspondence between Illinois Selective Service Agencies concerning right to add new evidence to Cover Sheet after appeal had been taken to board of appeal.

[See Record pp. 208-213, *Rinko* v. *United States*, No. 1071, October Term 1944, certiorari denied, 65 S. Ct. 1086]

[Appeal Board No. 1 to Local Board No. 122]

SELECTIVE SERVICE SYSTEM
Illinois Board of Appeal No. 1
105 W. Monroe St., Chicago, Ill.
ADMINISTRATOR

June 24, 1943

Chicago Local Board No. 122
2229 W. Chicago Avenue
Chicago, Illinois

Re: Alexander Rinko
Order No. 819

Gentlemen:

I enclose letter to me from the above registrant together with six affidavits which accompanied it.

I am today writing to the registrant. The Board of Appeal may not consider evidence not in the file at the time it was received from the Local Board.

If upon receipt of the enclosure you desire to reopen the case, will you please advise us and we will return the file. If on the other hand, these do not in your opinion warrant a change in the classification, I suggest that they be returned to the Board of appeal for inclusion in the file.

Very truly yours,

WM. H. KING, JR., Administrator
Illinois Board of Appeal No. 1

[Handwritten notation in margin of above letter:]
JUN 26 1943
Letters *not* to be admitted as evidence, being filed after classification and appeal.

LOUIS STEINBERG
JAMES JAY
[Members of Local Board]

Classification to remain in 1-A-O.
Received June 30, 1943
Illinois Board of Appeal No. 1

Local Board No. 122 61
Chicago, City 731
JUN 28 1943 122
2229 West Chicago Ave.
Chicago, Illinois

[ALEXANDER RINKO to Appeal Board No. 1]

June 30, 1943

Mr. William H. King, Jr., Administrator
Illinois Board of Appeal No. 1
105 West Monroe Street
Chicago, Illinois

Dear Mr. King:

In re: My appeal from Board No. 122

I received your letter of June the 24th, last, on the 28th of June, and thank you for attention to my grievance, and for sending the affidavits back to the local board for consideration as to whether they wish to open the case of their own action.

However, I have learned indirectly that they will refuse to do so.

These affidavits were submitted to the board on June 14, 1943, within the ten days for completing my appeal, and I was told to bring them back the following Wednesday and deliver them to the appeal agent. When I returned Wednesday, Mr. Steinert, the clerk, told Mr. Rizzio, the appeal agent, that my affidavits had been refused by the board. Mr. Rizzio advised Mr. Steinert in my presence that they should not have been refused, but should have been included in my file. Mr. Rizzio then told me it was too late because the file was out of his hands.

The local board had no right to exclude my affidavits, therefore, will you please consider that the record before you now is incomplete and return the file to Local Board No. 122 with instructions to admit the affidavits?

Very truly yours,
ALEXANDER RINKO
2113 Lake Wood Avenue, Chicago, Ill.

[Appeal Board No. 1 to Illinois State Headquarters]

July 10, 1943

Major Baird V. Helfrich
Selective Service System
Armory Building
Springfield, Illinois

Re: Alexander Rinko
Chicago Board 122

Dear Baird:

Under date of June 18 I received a longhand letter from the above registrant enclosing six affidavits which he wished placed in his file. On June 24 I forwarded them to the local board who returned my letter with a notation in ink across the top. On June 24 I also wrote the registrant and received from him a reply under date of June 30. I am enclosing all of the items.

The appeal is now pending. The registrant is a member of Jehovah's witnesses and I should gather from the newspapers that he has been a source of difficulty from time to time. This however should not in any way prejudice his rights to a full and adequate presentation of his case to the Selective Service System.

I am writing you for your judgment as to whether or not the local board should receive these affidavits, and also whether in your opinion if the local board should receive them, should they forward them to the board of appeal in connection with the appeal now pending.

When you write would you be good enough to return all the enclosed papers.

Very truly yours,
WM. H. KING, JR., Administrator
Illinois Board of Appeal No. 1

[Illinois State Headquarters to Appeal Board No.1]

ILLINOIS STATE HEADQUARTERS
SELECTIVE SERVICE SYSTEM
Dwight H. Green, Governor
Paul G. Armstrong, Director
Armory Building

Springfield, Illinois

July 17, 1943

Honorable William H. King, Jr.,
Administrator, Illinois Board of Appeal No. 1,
105 West Monroe Street,
Chicago 3, Illinois.

Re: Alexander Rinko, Order No. 819,
Chicago City Local Board No. 122.

Dear Mr. King:

I return the enclosures submitted with your letters of July 10th in the above-entitled matter, indicating that the same should be enclosed in the file of the registrant and considered by the Appeal Board Group passing on this appeal case, since the Local Board does not care to reopen the case based on such evidence.

Respectfully yours,
For the State Director,
BAIRD V. HELFRICH,
Major, J. A. G. D.,
Legal Advisor

Enc.
cc—Chicago City Local Board No. 122
Lt. Colonel M. G. Buck.

[Appeal Board No. 1 to Illinois State Headquarters]

July 20, 1943.

Major Baird V. Helfrich
Selective Service System
Armory Building
Springfield, Illinois

Re: Alexander Rinko
Registrant No. 819
Chicago Board No. 122

Dear Baird:

I have your letter of July 17th concerning the above, but I do not understand it. The local board has taken the position that the affidavits are not to be included in the file on appeal, and in this it seems to me that they are technically correct, even though I might differ with them as to the wisdom of their decision. Such being the case, I am not clear on what basis I can now insert them in the file.

Please let us have your impression as soon as you can.

Very truly yours,
WM. H. KING, JR., Administrator
Illinois Board of Appeal No. 1

WHKjr:ea

[Illinois State Headquarters to Appeal Board No. 1]

July 23, 1943

Honorable William H. King, Jr.,
Administrator, Illinois Board of Appeal No. 1,
105 West Monroe Street,
Chicago 3, Illinois.

Re: Alexander Rinko
Order No. 819
Chicago City Local Board No. 122

Dear Bill:

If the Local Board has taken the decision that the affidavits in question are not to be included in the file on appeal, they are wrong, in the opinion of the writer, under Section 623.2, Regulations, for this is routine information that the registrant wishes to be included in his file, and the Local Board cannot exclude any such information, under the provisions of the above Section, (or it would then be in the Local Board's discretion as to just what information they would allow a registrant to submit.)

Consequently, probably the simplest way to handle these affidavits is to treat them as having been reviewed by the Local Board and reopening refused, so that they can now be included in the file and obtain a final decision from the Appeal Board.

Respectfully yours,
For the State Director,
BAIRD V. HELFRICH,
Major, J. A. G. D.,
Legal Advisor

cc—Chicago City Local Board No. 122
Lt. Colonel M. G. Buck